TRANSCRIP

OF

RECORD

(24,653)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1915.

No. 421.

HENRY H. KRYGER, PLAINTIFF IN ERROR,

vs.

EDWARD H. WILSON.

IN ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

INDEX.

	Original.	Print
Clerk's return to writ of error	*a*	1
Order extending time for filing record..(omitted in printing)..	*b*	
Writ of error	*c*	1
Certificate of lodgment.....(omitted in printing)..	*f*	
Citation and service	*g*	2
Transcript of record from the district court of Kidder county, North Dakota	1	3
Affidavit for publication of summons	1	3
Summons and service	4	6
Complaint	8	10
Answer and counter-claim of Kryger	9	11
Exhibit A—Earnest money, contract of sale, Peterson to Daniels-Jones Co., January 19, 1909	13	14
Exhibit B—Agreement between Kryger and Piper, December 30, 1910	15	15
Plaintiff's reply to answer and counter-claim of Kryger	16	16
Notice of trial.....(omitted in printing)..	25	
Note of issue.....(" ")..	26	

JUDD & DETWEILER (INC.), PRINTERS, WASHINGTON, D. C., OCTOBER 20, 1915.

	Original.	Print
Exhibit A—Affidavit of mailing copies and of no answer..	27	23
Affidavit, &c.....(omitted in printing)..	29	
Notice as to taking depositions.....(" ")..	30	
Deposition of Edward H. Wilson..(omitted in printing)..	31	
Plaintiff's Exhibit B—Warranty deed, Daniels-Jones Co. to Wilson, February 8, 1910 (omitted in printing)	42	
Plaintiff's Exhibit A—Warranty deed, Daniels-Jones Co. to Wilson, May 9, 1911..(omitted in printing)..	44	
Notary public's certificate to deposition (omitted in printing)	46	
Letter, Fry to judge of district court, June 17, 1912 (omitted in printing)	47	
Telegram, Fry to judge of district court, June 18, 1912 (omitted in printing)	48	
Findings of fact, conclusions of law, and order for judgment.....(omitted in printing)..	49	24a
Notice of taxation of costs.....(" ")..	59	
Affidavit of costs and disbursements (omitted in printing)	60	
Judgment	61	25
Notice of entry of judgment and return (omitted in printing)	63	
Exhibit A—Judgment and decree (omitted in printing)	64	
Notice of appeal.....(omitted in printing)..	67	
Undertaking on appeal.....(" ")..	68	
Specifications of errors.....(" ")..	69	
Clerk's certificate .....(" ")..	70	
Stipulation to submit.....(" ")..	71	
Opinion, Goss, J.	72	26
Judgment	84	33
Petition for rehearing.....(omitted in printing)..	85	
Exhibit—Excerpts from "Case and Comment" (omitted in printing)	107	
Order denying petition for rehearing...(omitted in printing)..	108	
Petition for writ of error, assignment, and prayer for reversal.	109	34
Order allowing writ of error	110	35
Bond on writ of error	111	35
Clerk's certificate	113	36
Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same	114	37

a & b UNITED STATES OF AMERICA,
Supreme Court of North Dakota, ss:

Return to Writ.

In obedience to the commands of the within Writ, I herewith transmit to the Supreme Court of the United States a duly certified transcript of the complete record and proceedings in the within entitled case, with all things concerning the same.

In witness whereof, I hereunto subscribe my name and affix the seal of the Supreme Court of North Dakota, in the City of Bismarck, this 24th day of March A. D. 1915.

[Seal State of North Dakota Supreme Court.]

R. D. HOSKINS,
Clerk Supreme Court North Dakota.

* * * * * * *

c Supreme Court of North Dakota.

HENRY H. KRYGER, Plaintiff in Error,
vs.
EDWARD H. WILSON, Defendant in Error.

Writ of Error.

UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the Honorable the Judges of the Supreme Court of the State of North Dakota, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court before you, or some of you, being the highest Court of law or equity of the said State in which a decision could be had in the said suit between Edward H. Wilson and Henry H. Kryger, wherein was drawn in question the validity of a treaty or statute of, or an authority exercised under, the United States, and the decision was against their validity; or wherein was drawn in question the validity of a statute of, or an authority exercised under, said State, on the ground of their being repugnant to the laws, treaties or laws of the United States, and the decision was in favor of such their validity; or wherein was drawn in question the construction of a clause of the Constitution, or of a treaty, or statute of, or commission held under the United States, and the decision was against the title, right, privilege, or exemption specially set up or claimed under such clause of the said Constitution, treaty, statute, or commission; a manifest error hath happened, to the great damage of the said Henry H. Kryger, as by his Answer appears.

We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties
d aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within thirty (30) days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, the Honorable Edward D. White, Chief Justice of the United States, this 30th day of January, in the Year of Our Lord, one thousand nine hundred and fifteen.

[Seal United States District Court, North Dakota.]

J. A. MONTGOMERY,
Clerk District Court of the United States for the District of North Dakota.

Allowed:
C. J. FISK,
Chief Justice Supreme Court of North Dakota.

e & f [Endorsed:] State of North Dakota Supreme Court. Henry H. Kryger, Plaintiff in Error, vs. Edward H. Wilson, Defendant in Error. Writ of Error. Wm. W. Fry, Attorney for Pl'ff in Error. 2603. Filed in the Office of the Clerk of the Supreme Court Feb. 15, 1915, State of North Dakota.

* * * * * * *

g Supreme Court of North Dakota.

HENRY H. KRYGER, Plaintiff in Error,
vs.
EDWARD H. WILSON, Defendant in Error.

Citation.

THE UNITED STATES OF AMERICA, *ss:*

The President of the United States to Edward H. Wilson, Greeting:

You are hereby cited and admonished to be and appear at and before the Supreme Court of the United States at Washington, D. C., within thirty (30) days from the date hereof, pursuant to a Writ of Error filed in the office of the Clerk of the Supreme Court of the State of North Dakota, wherein Henry H. Kryger is Plaintiff in Error and you are Defendant in Error, to show cause, if any there be, why the judgment rendered against said Plaintiff in Error as in said Writ of Error mentioned, should not be corrected, and why speedy justice should not be done the parties in that behalf.

POOR C

Witness, The Chief Justice of the Supreme Court of the State of North Dakota, this 15th day of February A. D. 1915.

C. J. FISK,
Chief Justice Supreme Court, North Dakota.

[Seal State of North Dakota, Supreme Court.]

Attest:

R. D. HOSKINS,
Clerk Supreme Court of North Dakota.

STEELE, NORTH DAKOTA, February 29th, 1915.

I, Attorney of record for the Defendant in Error in the above entitled case, hereby acknowledge due service of the above citation and enter an appearance in the Supreme Court of the United States.

REES L. PHELPS,
Attorney for Edward H. Wilson.

[Endorsed:] 2603. Filed in the office of the Clerk of the Supreme Court, Feb. 26, 1915, State of North Dakota.

1 On August 9th, A. D. 1913 there was filed in this office, on appeal from the district court of Kidder County, North Dakota, a record on appeal in words and figures as follows:

STATE OF NORTH DAKOTA,
County of Kidder, ss:

In the District Court, Sixth Judicial District.

EDWARD H. WILSON, Plaintiff,
v.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER, and All Other Persons Unknown Claiming Any Estate or Interest in, or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

Affidavit for Publication of Summons.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

Charles H. Stanley being duly sworn on oath says that he is a member of the law firm of Stanley and Phelps, Attorneys for the Plaintiff in the above entitled action and is one of the attorneys for the Plaintiff therein; that a verified complaint in said action is now on file in the office of the Clerk of the District Court of the Sixth Judicial District of the State of North Dakota in and for the County of Kidder and State of North Dakota, which Complaint sets forth a cause of action in favor of the Plaintiff, above named, and against the Defendants, above named; that the places of residence of the above named Defendants respectively are unknown to this affiant or

First publication Oct. 12, 1911. 12t6

Summons.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

In District Court, Sixth Judicial District.

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER and All Other Persons Unknown Claiming Any Estate or Interest in or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

The State of North Dakota to the above-named Defendants:

You are hereby summoned to answer the complaint in this action, which complaint has been this day filed in the office of the Clerk of the District Court of Kidder county, North Dakota, at Steele, N. D., and to serve a copy of your answer upon the subscribers within thirty days after the service of this summons upon you, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated October 4th A. D. 1911.

STANLEY & PHELPS,
Attorneys for Plaintiff,
Office and Post Office Address, Steele, N. D.

To the above-named Defendants:

Please take notice that the above entitled action is brought to quiet title, and relates to the following described real estate, situated in the county of Kidder, and state of North Dakota, to-wit:

All of sections seven (7), nine (9), fifteen (15), and seventeen (17), all in township one hundred forty-three (143), range seventy, two (72.)

Dated at Steele, N. D., this 4th day of October, A. D. 1911.

STANLEY & PHELPS,
Attorneys for Plaintiff, Steele, N. D.

5 STATE OF MINNESOTA,
County of Ramsey, ss:

Charles E. Nyberg, being first duly sworn, deposes and says that at the City of St. Paul, County and State aforesaid, on the 23d day of October, 1911, he served the attached Summons and Complaint on the within named William Piper personally by handing to and leaving with him a true and correct copy thereof and that at the

time of making such service affiant was and still is a deputy sheriff in and for said County.

CHARLES E. NYBERG.

Subscribed and sworn to before me this 25th day of October, 1911.
[SEAL.] FRANK ROBERT, JR.,
Notary Public Ramsey County, Minn.

My commission expires Oct. 6, 1113.

	Service	$1.00
	Copy	
Fees:	Mileage	.20
	Total	$1.20
	Notary fee	.25
		$1.45

STATE OF MINNESOTA,
County of Hennepin, ss:

M. P. Thune, being first duly sworn, deposes and says: I am a citizen and resident of said County of Hennepin, Minnesota, over 21 years of age; not related to either of the within named parties, nor in any manner interested in said case; that I am a duly appointed, qualified and acting Deputy Sheriff of Hennepin County, Minnesota; that the hereto attached Summons and Complaint came into my hands for service on the 16th day of October 1911, and that at the City of Minneapolis, County and State aforesaid, on the 17th day of October 1911, I duly served the Summons and Complaint hereto attached upon the within named Henry H. Kryger personally by then and there handing to and leaving with said Henry H. Kryger a true and correct copy thereof.

M. P. THUNE.

Subscribed and sworn to before me this 17th day of Octobed, 1911.
[SEAL.] JOHN P. MILL,
Notary Public, Hennepin County, Minn.

My commission expires January 2, 1916.

6 Sheriff's Fees—

Service	$1.00
Copy	$
Affidavit	.25
Travel	.16
Total	$1.41

COPY

In District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, WILLIAM PIPER and All Other Persons Unknown Claiming any Estate or Interest in or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

I, James Filbin, Sheriff of said County, herefy certify and return that the Summons and Complaint in the above entitled action which are hereunto attached, came into my hands for service on the 4th day of October 1911; that I made diligent search and inquiry for the above named Defendants Henry H. Kryger, Carl Peterson, William Piper, et al., upon whom to make legal service of said Summons and Complaint but after such search and inquiry I have been unable to find said Defendants or any thereof in Kidder County, North Dakota, upon whom to make service thereof.

Dated Steele N. D., October 5th, 1911.

JAMES FILBIN,
Sheriff of Kidder County, N. D.
By —— ——, *Deputy.*

Sheriff's Fees:

Service, return	$1.20
Copies	
Mileage	.20
Livery	
Total	$1.40

POOR

7 STATE OF NORTH DAKOTA,
County of Kidder, ss:

In the District Court, Sixth Judicial District.

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER and All Persons Unknown Claiming Any Estate or Interest in or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

Summons.

The State of North Dakota to the above-named Defendants:

You are hereby summoned to answer the complaint in this action, which complaint has been this day filed in the office of the Clerk of the District Court of Kidder County, North Dakota, at Steele, N. D., and to serve a copy of your answer upon the subscribers within thirty days after the service of this summons upon you, exclusive of the day of service; and in case of your failure to appear or answer judgment will be taken against you by default for the relief demanded in the complaint.

Dated, October 4th, A. D. 1911.

STANLEY AND PHELPS,
Attorneys for Plaintiff, Office and Post Office Address, Steele, N. D.

To the above-named Defendants:

Please take notice that the above entitled action is brought to quiet title, and relates to the following described real estate, situated in the County of Kidder, and State of North Dakota, to-wit:

All of Sections Seven (7), Nine (9), Fifteen (15), and Seventeen (17), all in Township One Hundred Forty-three (143), Range Seventy-two (72).

Dated at Steele, N. D., this 4th day of October A. D. 1911.

STANLEY AND PHELPS,
Attorneys for Plaintiff, Steele, N. D.

COPY

complaint herein and that said notice was duly recorded in the said County of Kidder and State of North Dakota on the 1st day of March 1909 in Miscellaneous Book "d" at page 230 thereof. Reference is here made to the contents of said notice as the same is recorded in said office.

That on or about the 30th day of December 1910 the said defendant entered into a contract with one William Piper of Ramsey County Minnesota wherein and whereby he agreed to sell a one half interest in and to the real estate described in the said
11 complaint for the sum of $15,000.00 and a contract was duly filed of record in the office of the Register of Deeds in and for the County of Kidder and State of North Dakota on the 3rd day of January 1911 in Book E of Miscellaneous Contracts on page 215 thereof. A copy of said Contract is hereto attached marked exhibit "B" and made a part hereof as if fully set out herein.

That said contracts Exhibit "A" and "B" respectfully were made executed and delivered in the State of Minnesota and the interpretation of the same is governed by the laws of the state of Minnesota.

That section 4442 of the revised laws of the State of Minnesota for the year 1905 provides as follows:

Notice to terminate Contract of sale. — When default is madde in the conditions of any contract for the conveyance of real estate or any interest therein whereby the vendor has a right to terminate the same he may do so by serving upon the purchaser his personal representatives or assigns a notice specifying the conditions in which default has been made and stating that such contract will terminate thirty days after the service of said notice unless prior thereto the purchaser shall complay with such conditions and pay the costs of service. Such notice must be given notwithstanding any provision in the contract to the contrary and shall be served in the same manner as a summons in the district court * * *.

That said section has not been complied with nor has any notice of the cancellation of the said contract exhibit "A" ever been served upon the defendant Henry H. Kryger although the said Daniel Jones Company were in constant communication with the said Henry H. Kryger.

That when said William Piper discovered that there was a hitch or a fault in the title to said land he refused to carry out said terms in said contract Exhibit "B" and the same was never actually con-sum-ated.

That on or about the 20th day of January 1909 the said defendant Henry H. Kryger met one C. W. Barnes representing the said Daniel-Jones Company and the said Carl Peterson and in taking the contract exhibit A from said C. W. Barnes he paid or caused to be conveyed to these parties two hundred and Forty acres of land in Scott County Minnesota valued in the trade at Fifteen Thousand
12 Dollars which said sum was to apply on the amount named in the Contract Exhibit "A" herein. That said sum of Fifteen Thousand Dollars has never been paid back to him and the same is a credit on the amount due under said Contract Exhibit "a."

POOR

Counter Claim.

The above named defendant as and for a Counter claim against the plaintiff herein complains and alleges.

That the said defendant Henry H. Kryger at all times is hereinafter mentioned was, ever since has been, and now is entitled to the possession and control of the real estate described in the complaint herein under a contract of sale of said real estate as mentioned in Exhibit "a" of said defendant's answer herein and said defendant refers to said exhibit "a" as fully as if all of its statements are set out in full herein and said Exhibit "A" above referred to is made a part of this counter claim.

That said plaintiff has used said real estate for the years 1910 and 1911 and that the reasonable rental for the use of said real estate is the sum of One Dollar per acre per year and the rental for said premises for the said past two years is the sum of Five Thousand One Hundred and Sixty Dollars and that no part of the same has been paid although duly demanded.

That said defendant has been at all times ready and willing to carry out the terms of his said Contract Exhibit "A" and has never been able to make a settlement with the said Daniel Jones Company and that the said company has never given said defendant any credit for his payment on said Contract Exhibit "A" and that the plaintiff has never accounted to the said defendant for the use of said land. That said defendant is ready and willing at this time to pay to the proper party the amount that may be found due on said contract Exhibit "A."

Wherefore the above named defendant demands judgment that he is the owner of said real estate described in the complaint and that the plaintiff's interest if any there is is junior and inferior to that of the defendant herein and that the Court make a judgment of accounting as to the amount if any that is due from the defendant in this action and that defendant have judgment against the plaintiff for the sum of Five Thousand One Hunded and sixty Dollars *Dollars* for the use and occupancy of said premises and for such other and further relief as may be just in the premises.

13

HENRY H. KRYGER,
Defendant.

#531 Century Bldg., Minneapolis, Minn.

STATE OF MINNESOTA,
County of Ramsey:

Henry H. Kryger being first duly sworn on oath says: That he is the defendant in the above entitled action that he has heard read the foregoing answer and Counterclaim and that he knows the contents thereof and that the same is true except as to those matters therein stated on information and belief and as to those matters he believes them to be true.

HENRY H. KRYGER.

COPY

Subscribed and sworn to before me this 13th day of November 1911.

[SEAL.] WILLIAM W. FRY,
Notary Public, Ramsey County, Minnesota.

My commission expires April 13th, 1917.

EXHIBIT A.

Ernest Money, Contract of Sale.

MINNEAPOLIS, MINN., January 19th, 1909.

Received of Carl Peterson of Minneapolis, Minnesota One & no-100 dollars ($1.00) as earnest money and in part payment for the purchase of the following described property situated in the County of Kidder and State of North Dakota, viz:

All of sections seven (7) Nine (9) Fifteen (15) and Seventeen (17) in Township One hundred forty three (143) Range Seventy two (72) containing in all Twenty five hundred sixty (2560) acres more or less according to the United States Government Survey thereof, which we have this day sold and agreed to convey to said Carl Peterson for the sum of Twenty one thousand seven Hundred sixty Dollars ($21,760.00) on terms as follows viz. One and
14 no-100 Dollars ($1.00) in hand paid as above and $1,280 March 1st 1909, $3,560. April 1st 1909, $2,560 May 1st 1909, $2,560 June 1st 1909 $2,560. July 1st 1909 $2,560. August 1st 1909 $2,560. October 1st 1909 and $2,559. November 1st 1909 payable on or before the dates as named above or as soon thereafter as a Warranty Deed conveying a good title to said land is tendered, time being considered of the essence of this contract.

It is understood that complete abstract of title continued to date is to be furnished purchaser at the expens*t* of the vendor after which ten days is to be allowed purchaser for examination — title and report. Interest on all deferred payments to be at the rate of six per cent per annum.

It is agreed that if the title to said premises is not good and cannot be made good within sixty days from date hereof this agreement shall be void and the above one & no 100 Dollars ($1.00) shall be forfeited to the said Daniel Jones Company.

But it is agreed and understood by all parties to this agreement that said forfeiture shall in no way affect the rights of either party to enforce the specific performance of this contract.

[Corporate Seal, Daniel-Jones Company, North Dakota.]

DANIEL-JONES COMPANY,
By H. G. DANIELS, *Sec'y.*

I hereby agree to purchase the said property for the price and upon the terms above mentioned and also agree to the conditions of forfeiture and all other conditions therein expressed.

Jan'y 20th, 1909.

CARL PETERSON.

POOR

In consideration of One Dollar in hand paid I hereby assign all my right title and interest in this Contract to H. H. Kryger Land Co. which he assumes and agrees to pay.

CARL PETERSON.

Witness:
A. W. MOREY.

EXHIBIT B.

This agreement made and entered into this 30th day of December A. D. 1910 by and between Henry H. Kryger of Hennepin
15 County State of Minnesota party of the first part and William Piper of Ramsey County and State of Minnesota party of the second part.

Witnesseth: That the said party of the forst part in consideration of the covenants and agreements of said party of the second part or his assigns — undivided one hald interest upon the prompt and full performance of said party of the second part of his part of this agreement the following described premises situate in the County of Kidder State of North Dakota Description of land as follows Section 7 and section 9 and section 15 and section 17 all in Town 143 Range 72 in Kidder County State of North Dakota containing 2560 actes more or less according to the Government survey thereof. It conveys the same land which the contract is made the 19th day of January 1909 from Daniels Jones (a corporation) to Carl Peterson and Carl Peterson signed over to Henry H. Kryger for the sum of Fifteen Thousand Dollars ($15,000) on January 20th 1909 which he holds this contract from Carl Peterson in trust and he has a perfect right to convey with full power. However subject to $8.50 against each acre at six per cent interest from the 19th day of January 1909.

That Daniel and Jones agrees to furnish a good and sufficient warranty deed upon the payment of $8.50 per acre and interest. And the said party of the second part in consideration of the premises has paid said party of the first part as and for the purchase price of said premises the sum of Fifteen Thousand Dollars in the manar and and it times following towit, for undivided one half interest.

It is mutually agreed by and between the parties hereto that the time of payment shall be an essential part of this Contract and that all covenants and agreements herein contained shall extend to and be obligatory upon the heirs executors administrators and assigns of the respective parties.

In testimony whereof both parties have hereunto set their hands and seals the *the* day and year hereinbefore written.

HENRY H. KRYGER. [SEAL.]

Signed seal and delivered in presence of—

A. P. PETERSON.
JOSEPH K. BLUM.

OPY

16 STATE OF MINNESOTA,
County of Hennepin, ss:

On this 30th day of December A. D. 1910 before me a Notary Public within and for said County personally appeared Henry H. Kryger singel to me known to be the person described in and who executed the foregoing instrument and acknowledged that he executed the same as — free act and deed.

[NOTARIAL SEAL.] ANDREW P. PETERSON,
Notary Public, Hennepin County, Minn.

Notarial Commission expires Feb. 15th, 1915.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

In District Court, Sixth Judicial District.

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER, and All Other Persons Unknown Claiming Any Estate or Interest in or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

Plaintiff's Reply to the Separate Answer and Counter Claim of the Defendant Henry H. Kryger.

The Plaintiff for his Reply to the separate answer and counterclaim herein of the defendant, Henry H. Kryger, shows to the Court:

I.

That the Plaintiff denies generally and specifically each and every allegation of said answer and said counterclaim, except as hereinafter admitted, qualified or otherwise stated or alleged.

II.

That the Plaintiff admits that on or about the 19th day of January A. D. 1909 one Daniels-Jones Company, a corporation, was the owner of the real estate described in the complaint herein and on said date made the contract with one Carl Peterson referred to in said defendant's said answer and Plaintiff alleges that said
17 Carl Peterson is one of the defendants in this action.

III.

That the Plaintiff denies that on or about the 20th day of January 1909 or at any other time said Carl Peterson for a valuable consideration or otherwise sold and assigned said contract to the H. H. Kryger Land Company.

POOR

IV.

That the Plaintiff admits at the times mentioned in said defendant's said Answer he, said defendant, was and still is doing business under the name and style of H. H. Kryger Land Co.

V.

That the plaintiff admits that on or about Febraury 24th, 1909 said defendant caused to be placed of record in the County of Kidder, North Dakota, the alleged notice referred to in said Answer, and that the same was recorded in Miscellaneous Book D, at page 230 thereof, March 1st, 1909, but the Plaintiff alleges that said alleged notice was not such an instrument as was then, or ever, entitled to record in the office of said Register of Deeds; and further that such instrument was not when so recorded, acknowledged as prescribed by the laws of the State of North Dakota, and was not entitled to record in said State, and that the said recording and record thereof did not and does not operate as notice either actual or constructive to any person, or persons whomsoever nor to the public.

VI.

That the Plaintiff alleges that from and after the execution and delivery of the aforesaid contract no payments of any sum of money whatever were made on said contract by said Carl Peterson or any other person whomsoever and that the terms and conditions of said contract which were to have been performed and carried out by said Carl Peterson were absolutely ignored and violated by the said Carl Peterson and never carried out or performed by him or by any other persons whomsoever.

18 VII.

That the Plaintiff alleges that under the terms and provisions of said contract the sum of Twelve Hundred and Eighty Dollars was due and payable thereon on March first 1909 with interest at six per cent per annum from January 19th 1909, and that on the first day of April A. D. 1909 the further sum of Three Thousand five hundred and sixty dollars was due and payable thereon with interest at six per cent per annum from January 19th, 1909, but that neither of said sums of money or any part thereof was paid or tendered when due or at any other time by said Carl Peterson or by an- other person whomsoever and that at the time of the execution of said contract the said Daniels-Jones Company was a corporation duly organized and existing under and by virtue of the laws of the State of North Dakota with its headquarters and an office at Lisbon, North Dakota, and with an office at Number 311 Security Bank Building, in the City of Minneapolis, State of Minnesota, and that said corporation has been at all times since and is now in existence and doing business as a corporation at its office in Lisbon, North Dakota, and at its said office in said City of Minneapolis, and elsewhere, and

That on April 17th, 1909 said defaults still existing and said sums

OPY

of money due and payable on March 1st, 1909, and April first 1909 respectively, as aforesaid, remaining wholly unpaid, said corporation being then the owner and holder of said Contract and of the lands therein described, (said lands being the lands involved in this action), and desiring to cancel and terminate the same did cause a written notice to be prepared and executed for service upon the said vendee, Carl Peterson, and the defendant, Henry H. Kryger, stating, among other things, that said contract would be terminated and cancelled and the time when said cancellation and termination would take effect which said notice was and is in the following words and figures, to-wit:

"MINNEAPOLIS, MINN., April 7, 1909.

To Carl Peterson and Henry H. Kryger, Minneapolis, Minnesota.

19 Sirs: Please Take Notice, that you are in default under and according to the terms, conditions and provisions of that certain contract, dated January 19, 1909 whereby Daniels-Jones Company, a corporation, of the City of Minneapolis, Hennepin County, Minnesota, agreed to convey unto said Carl Peterson, upon full and timely performance by you, of your part of the terms, conditions and provisions thereof, reference to which contract for more particularly, is hereby made, all of the following described real estate situated in the County of Kidder and State of North Dakota, to-wit: All of Sections seven (7), nine (9), fifteen (15), and seventeen (17), in Township One hundred forty-three (143), Range Seventy-two (72), containing in all twenty-five hundred and sixty (2560) acres of land more or less according to the United States Government Surety.

And that according to the terms, conditions and provisions of said contract there became due and payable from you to said Daniels-Jones Company on the first day of March 1909, the sum of twelve hundred and eighty dollars ($1,280.00), and on the first day of April 1909, the sum of twenty-five hundred and sixty dollars ($2,560.00) with interest on each of said payments at six per cent (6%) per annum from the date of said contract; and that at the date of this notice, said amount and interest still remains over due and unpaid, and said default as above specified still exists.

Now, Therefore, you are hereby notified that unless, on or before thirty (30) days after the service of this notice upon you, you pay to said Daniel-Jones Company at 311 Security Bank Building, Minneapolis, Minnesota, the amount of money above stated, with interest to the date of such payment, and pay the cost of service of this notice upon you and perform all the terms and conditions and comply with all the provisions of said contract on your part to be performed, said contract will be cancelled and terminated and all your right, title and interest thereunder and in and to the land and property covered thereby will be forfeited and cancelled.

DANIELS-JONES COMPANY,
By H. T. DANIELS, *Sec'y.*"

Dated April 7th, 1909.

POOR

20 and that said corporation placed such notice in the hands of the Sheriff of the County of Kidder, State of North Dakota, the county in which said lands are situated), for service upon the said Carl Peterson and upon the said Henry H. Kryger and that said Sheriff on the 25th day of April, 1909, made his official return showing that after due and diligent search and inquiry, for the purpose of serving such notice he was unable to make personal service thereof upon said Carl Peterson and said Henry H. Kryger, or either of them, within the County of Kidder, State of North Dakota, and that said Carl Peterson and said Henry H. Kryger could not be found within said County of Kidder.

VIII.

That the Plaintiff alleges that at the date of such notice said Carl Peterson and said Henry H. Kryger were each non-residents of the State of North Dakota and ever since have continuously been and now are non-residents of said State.

IX.

That after the said sheriff of said County of Kidder had made his said official return, as aforesaid, such notice was served upon the said Carl Peterson and Henry H. Kryger, by publication in the Kidder County Herald, a weekly newspaper, printed and published at the City of Steele in said County of Kidder, and was published in said newspaper three successive weeks and that the first publication of said notice in said newspaper was made on the first day of May A. D. 1909, and that the second publication thereof was made in said newspaper on the 8th day of May 1909 and that the third publication thereof was made in such newspaper on the 15th day of May A. D. 1909.

X.

That at no time after the said service of such notice upon the said Carl Peterson and said Henry H. Kryger was any sum of money whatever paid or tendered to said Daniels-Jones Company, a corporation, or to any person for said corporation, to apply on said contract and that on January 9th, 1910 said H. T. Daniels, as the Secretary and Treasurer of said corporation, and for and in behalf thereof, made his affidavit of non-redemption of said lands
21 which said affidavit was and is in the following words and figures, to-wit:

"STATE OF MINNESOTA,
County of Hennepin, ss:

Harvey T. Daniels being first duly sworn deposes and says that he is the Secretary and Treasurer of Daniels-Jones Company, a corporation;

That on or about April 17th, 1909, he issued on behalf of said corporation, a Notice of Termination of Contract dated January 19th, 1909, between said Daniels-Jones Company and Carl Peterson and

OPY

Henry H. Kryger; in which notice said purchasers were required to pay to said Daniels-Jones Company, at 311 Security Bank Building, Minneapolis, Minnesota, the sum of thirty-eight hundred and forty Dollars ($3,840.00) and interest thereon as stated in said notice, and to pay the costs of service of said notice, on or before thirty (30) days after service of said notice.

That service of said notice upon said purchasers was completed prior to July 1, 1909.

That said purchasers have not paid to said Daniels-Jones Company any sum of money whatever to apply on the amount due on said contract as stated in said notice; and that no person has paid or tendered to said Company on behalf of said purchasers, to apply on the amount named in said notice any sum of money whatsoever.

That said Contract is wholly and in all respects terminated and cancelled.

HARVEY T. DANIELS, *Sec'y.*

Subscribed and sworn to before me this 4th day of January A. D. 1910.

[SEAL.] J. VAN VALKENBURG,
Notary Public, Hennepin County, Minn.

My commission expires Jan. 13, 1910.

Filed for record Dec. 3rd. A. D. 1910 at 1 P. M. Recorded in Book 29, Misc'l. page 81."

XI.

That thereafter and on December 3rd, *1910,* A. D. 1910 at 1
22 o'clock P. M. the aforesaid notice of cancellation and termination of such contract, and the said Return of the sheriff of said County of Kidder, and an affidavit of publication of such notice in said newspaper and said affidavit of non-redemption were each and all filed for record in the office of the Register of Deeds of said County and were recorded in Book 29 of Miscellaneous Records, at pages 81, 82, 83 and 84 thereof, reference to the record of which is hereby made. That said contract was cancelled and terminated by the said Daniels-Jones Company, as aforesaid, prior to January 5th, 1910 and that thereafter said Daniels-Jones Company sold all of said lands to the Plaintiff herein and conveyed the same to him by its warranty deeds dated February 8th 1910 and May 9th 1911, respectively, and that said deeds were filed for record in the office of the Register of Deeds of said Kidder County and were recorded in Book 25 at pages 23 and 65 respectively thereof, and that the Plaintiff entered into the possession and occupancy of said lands and all thereof under such deeds and continued to possess and occupy the same thereunder until after the commencement of this action and that none of the defendants herein have ever been in possession of or occupied said lands or any thereof, and that none of said defendants ever claimed any right to the possession or occupancy thereof prior to the commencement of this action.

POOR C

XII.

That the Plaintiff alleges that at the time of the execution of said contract dated January 19th, 1909, the said Daniels-Jones Company was able, ready and willing to execute and deliver to the said purchaser, Carl Peterson, or to his lawful assigns, a warranty deed to said lands and all thereof and to convey a good and merchantable title thereto upon full payment of the purchase price of said lands, and was able, ready and willing so to do at all times thereafter until the said contract had been terminated and cancelled, as aforesaid, but that at no time after January 19th, 1909, and before the making of said affidavit of non-redemption by said H. T. Daniels on January 4th, 1910, did said Carl Peterson or any other person demand a deed of conveyance of said lands or any thereof, or pay or
23 tender or offer to pay or tender any sum of money whatever on said contract or deliver or offer to deliver to said Daniels-Jones Company, a corporation, or to anyone for said corporation, any thing of value whatever to apply upon said contract in payment or settlement thereof or of any part thereof; and the plaintiff further alleges that the said Daniels-Jones Company did not at the time of the execution of said contract or at any time thereafter have in its employ or engaged as its representative in any capacity whatever the said C. W. Barnes, mentioned in the said Answer and Counter-claim of said defendant, Henry H. Kryger, or any other person named C. W. Barnes, and did not at said time or any other time either directly or indirectly receive from said defendant, Henry H. Kryger, or any other person the two hundred and forty acres of land mentioned in said defendant's said Answer or any part of said land or any deed of conveyance thereof or of any part thereof to apply on said contract of January 19th, 1909, or for any other purpose whatever.

XIII.

That the plaintiff alleges that on January 3rd, 1911, said Defendant filed for record in the office of the Register of Deeds of said Kidder County the paper or instrument referred to as "Exhibit B" in the said Answer and Counter-claim of said defendant, Henry H. Kryger, and attached to said Answer by copy, and that such instrument was recorded in Book E of Miscellaneous Records at Page 216 thereof, but that the said instrument was not such an instrument as was then, or ever, entitled to record in the office of said Register of Deeds, and that the said recording and record thereof did not and does not operate as notice either actual or constructive to any person, or persons w-omsoever nor to the public; and the plaintiff further alleges that at the time said defendant, Henry H. Kryger, executed such instrument and so filed the same for record, and for a long time prior thereto he, said defendant, had actual, as well as constructive notice, of the aforesaid cancellation of said land contract between said Daniels-Jones Company, a corporation, and said Carl Peterson, and of all steps taken by said corporation to
24 cancel such contract and of the aforesaid filing and recording of each and all of the papers, notices and affidavits connected with the said cancellation heretofore mentioned.

PY

XIV.

That the Plaintiff admits that Section 4442 of the Revised laws of 1905 of the State of Minnesota reads as set forth in said Answer.

XV.

That the plaintiff denies that the defendant, Henry H. Kryger, is now or ever was entitled to the possession and control of the real estate described in the complaint in this action, or any part thereof, and denies that the reasonable rental for the use of said real estate for the years 1910 and 1911 is the sum of One Dollar per acre per year or any other sum of money greater than five cents per acre per year, and denies that the rental for said premises for the said past two years is the sum of Five Thousand One Hundred and Sixty Dollars or any other sum of money greater than two hundred and fifty-six dollars, and the plaintiff admits that no sum of money whatever has been paid to the said defendant, Henry H. Kryger, as rental for said lands for said years, and alleges that he, said plaintiff, is not indebted to said defendant in any sum of money whatever for the rental, use and occupancy of said premises for said years, and that he never has been indebted at any time to said defendant therefor or for any other claim or demand whatever.

Wherefore, Plaintiff demands judgment that the prayer of the said defendant, Henry H. Kryger, contained in his said Answer and Counter-claim herein be denied in all respects and that the plaintiff have judgment herein as prayed for in his Complaint herein, and that he have such other relief as may be just and equitable in the premises.

Dated at Steele, N. D., December 13th, A. D. 1911.

STANLEY AND PHELPS,
Attorneys for Plaintiff, Steele, North Dakota.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

Charles H. Stanley being duly sworn on oath says
25 & 26 that he is a member of the law firm of Stanley and Phelps, of Steele, North Dakota; that he has read the above and foregoing reply subscribed by his said firm, and knows the contents thereof, and the *the* same is true to his best knowledge, information and belief, and that he is one of the attorneys for the plaintiff in the above entitled action.

CHARLES H. STANLEY.

Subscribed and sworn to before me this 13th day of December A. D. 1911.

[SEAL.] C. O. SEAGREN,
Judge of the County Court Kidder County, N. Dak.

* * * * * * *

POOR C

27 EXHIBIT "A."

United States Post Office Registry Receipt issued at Steele, N. D. P. O. 10/14/1911—#128, from Stanley & Phelps, addressed to William Piper, St. Paul, Minn., United States Post Office Registry Receipt issued at Steele, N. D. P. O. 10/14/1911—#129, from Stanley & Phelps, addressed to Henry D. Kryger, No. 521 Century Bldg. Mpls. Minn.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

In District Court, Sixth Judicial District.

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER and All Other Persons Unknown Claiming any Estate or Interest in or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

Affidavit of Mailing Copies and of No Answer.

Charles H. Stanley being duly sworn on oath says that he is a member of the law firm of Stanley & Phelps, of Steele, N. D., and that he is one of the attorneys for the plaintiff in the above entitled action and makes this affidavit for and on behalf of said plaintiff; that a verified complaint in said action was filed in the office of the clerk of the District Court of the County of Kidder, State of North Dakota, at Steele, N. D., on the 4th day of October, 1911, and that summons herein has been duly filed in said office; that on the 4th day of October, 1911, he, affiant, placed the summons in this action in the hands of the Sheriff of said Kidder County for service upon the above named defendants and that thereafter and on October 5, 1911, said Sheriff made his official return on said summons showing that after diligent search and inquiry for the above named defendants for the purpose of serving the summons and complaint herein upon such defendants he was unable to find any of such defendants in Kidder County, North Dakota, upon whom to make service thereof; and that such return is now on file in the office of
28 said Clerk and was filed therein on October 5, 1911, at eight o'clock A. M.; that on October 7, 1911, this affiant, as one of the attorneys for plaintiff herein, and for and on behalf of the plaintiff, made an affidavit for publication of the summons herein and filed the same in the office of said Clerk on October 7, 1911, at 10 o'clock A. M.; and that the summons herein was served by publication herein upon the above named defendants and that such summons was published in the Steele Ozone, a weekly newspaper printed and published at Steele, N. D., and was published in said

OPY

newspaper six times, once each week, for six successive weeks, and was published in said newspaper the first time on October 12, 1911; that on October 14, 1911, he, affiant, mailed, full, true and correct copies of the summons and complaint herein to the above named defendant, William Piper, at St. Paul, Minnesota, and to the above named defendant, Henry H. Kryger, at No. 521 Century Building, Minneapolis, Minnesota and that on said day last named, he, affiant, deposited in the United States Post Office at Steele, N. D., such copies in sealed envelopes addressed as aforesaid and registered the same and that the postage thereon was fully prepaid and that the receipt of the Postmaster at Steele, N. D., for such registered matter is hereto attached marked "Exhibit A" and made a part hereof; that on October 23, 1911, the summons and complaint herein were personally served upon the above named defendant, William Piper, at and within the City of St. Paul, County of Ramsey, State of Minnesota, as is more fully shown by the verified return of Charles E. Nygard, Esq., a deputy sheriff in and for said county, attached to said summons and complaint and now on file herein; and that the summons and complaint herein were on October 16, 1911, personally served upon the above named defendant, Henry H. Kryger, at and within the City of Minneapolis, County of Hennepin and State of Minneapolis, as is more particularly shown by the affidavit of M. P. Thune, a deputy sheriff of said Hennepin County, attached to said summons and complaint and now on file herein; that more than sixty-six days have elapsed since the first publication of the Summons herein in said newspaper and more than thirty
29–48 days have elapsed since the service of the summons herein upon each and all of the defendants herein was complete but that no answer or demurrer to the complaint herein has been received by the plaintiff herein or his attorneys herein excepting from said defendant, Henry H. Kryger, who has made and served and filed herein his Answer to the plaintiff's complaint herein; and that none of the above named defendants have in any manner appeared in this action excepting the said defendant, Henry H. Kryger.

CHARLES H. STANLEY.

Subscribed and sworn to before me this 22nd day of January A. D. 1912.

M. F. WAESSNER,
Clerk of the District Court,
Kidder County, N. D.

* * * * * * *

POOR

STATE OF NORTH DAKOTA,
County of Kidder, ss:

In District Court, Sixth Judicial District.

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER and All Other Persons Unknown Claiming Any Estate or Interest in, or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

Findings of Facts, Conclusions of Law, and Order for Judgment.

The above entitled action having been regularly brought before the Court for trial at a regular term thereof held at the Court House in the City of Steele, County of Kidder, State of North Dakota, on the 18th day of June, A. D. 1912, Messrs. Stanley & Phelps, appearing as attorneys for the plaintiff in said action, and there being no appearance by, for or on behalf of any of the defendants therein, and it appearing to the satisfaction of the Court that the summons in this action has been duly served upon each and all of the defendants herein by publication as required by law and that such summons and the complaint herein were each personally served upon
50 the above named defendant, Henry H. Kryger, at and within the County of Hennepin, State of Minnesota, on the 17th day of October, 1911, and that such summons and complaint were also served upon the above named defendant, William Piper, personally, at and within the County of Ramsey, State of Minnesota, on the 23rd day of October, 1911; and that more than sixty-six days have elapsed since the first publication of said summons and that more than thirty days have elapsed since the service of the summons herein upon each and all of the defendants herein was complete, and that no one of said defendants, excepting the said defendant, Henry H. Kryger, has appeared in any manner in this action and that no answer or demurrer to the complaint herein has been received by plaintiff's attorneys herein, or been filed herein, excepting the answer of the above named defendant, Henry H. Kryger; and that the defendants, excepting the defendant, Henry H. Kryger, are in default herein; and that said Henry H. Kryger has not appeared in this action by an attorney of record in this state or an attorney of record of any other state, excepting that said defendant appeared by his attorney Wm. W. Fry, before Elijah Barton, Esq., a Notary Public in and for Hennepin County, State of Minnesota, on the 17th day of June, 1912, at the taking of the deposition of plaintiff's witness Edward H. Wilson, the plaintiff in this action, and that said defendant, Henry H. Kryger, also appeared personally before said Notary Public at the taking of said deposition;

Now, therefore, the Court having heard and considered the evidence and proofs submitted on the part of the plaintiff herein in support of all the allegations of the complaint herein and having heard

COPY

Messrs. Stanley & Phelps as Attorneys for the plaintiff herein, and having considered the matter and being fully advised in the premises hereby makes and files herein as its decision herein the following

Findings of Facts.

I.

That the summons herein has been duly served upon each
51 and all of the defendants herein by publication as required by law, and that the summons and complaint herein were also personally served upon the defendant, Henry H. Kryger, at and within the County of Hennepin, State of Minnesota, on the 17th day of October, 1911; and that such summons and complaint were also personally served upon the defendant, William Piper, at and within the County of Ramsey, State of Minnesota, on the 23rd day of October, 1911, and that more than thirty days have elapsed since the service of the summons herein upon each and all of the defendants herein was complete and that no answer or demurrer to the plaintiff's complaint herein has been received by the plaintiff's attorneys herein, or filed herein, excepting that said defendant, Henry H. Kryger served and filed his answer herein and that said defendants have not nor has any thereof appeared in any manner herein excepting as aforesaid that said Henry H. Kryger served herein his answer to the plaintiff's complaint herein and filed the same herein, and that said defendant, Henry H. Kryger did not appear herein by an attorney of record who was a resident of this state or by an attorney of record who was a resident of any other state, excepting that the said defendant appeared before Elijah Barton, Esq., a Notary Public, in and for the County of Hennepin, State of Minnesota, at his office in the city of Minneapolis, on the 17th day of June, 1912, with his attorney, Wm. W. Fry, who is a member of the Bar of the State of Minnesota, and then and there attended the taking of the deposition of the plaintiff herein who was a witness in his own behalf.

II.

That the real property involved in this action and described in the complaint herein is situated in the County of Kidder, State of North Dakota, and is described as follows, to-wit:

All of Sections Seven (7), Nine (9), Fifteen (15), and Seventeen (17), all in Township One Hundred Forty-three (143), North, Range Seventy-two (72), West of the Fifth Principal Meridian.

III.

That the plaintiff, Edward H. Wilson, acquired title to said
52 lands and all thereof by deeds from Daniels-Jones Company, a corporation, duly organized and existing under the law of the State of North Dakota, with its principal place of business at the

POOR

City of Lisbon, North Dakota, and with an office in the Security Bank Building, in the City of Minneapolis, State of Minnesota, and that the deed from said Company to the Plaintiff herein conveying all of said lands, excepting the Northeast Quarter of said Section 7, is dated May 9, 1911, and was recorded in the office of the Register of Deeds of K County, North Dakota, May 15, 1911, at 10 o'clock A. M. in Book 25 of Deeds at page 65 thereof; and that the deed from said Company conveying the Northeast Quarter of said Section 7 to the Plaintiff herein is dated the 8th day of February, 1910, and was recorded in the office of said Register of Deeds June 6, 1910, at 9 o'clock A. M. and was recorded in Book 25 of Deeds at page 23 thereof, and that the said plaintiff was the owner of all of said lands at the time of the commencement of this action.

IV.

That the said Daniels-Jones Company was the owner of all of said lands on or about the 19th day of January, 1909, and on said date, January 19, 1909, entered into a written agreement with the defendant, Carl Peterson, to sell all of said lands to said Peterson and that under the terms of said agreement said Carl Peterson was to pay said Daniels-Jones Company therefor in installments and that by the terms of said agreement $1.00 was to be paid at the date of such agreement, and $1,280.00 was to be paid March 1, 1909, and $2,560.00 April 1, 1909, and that the balance of the agreed purchase price was to be subsequently paid at the times mentioned in said agreement, but that no sum or sums of money whatever have been paid upon said contract to the said Daniels-Jones Company or to any other person or corporation for said Company; and that on the 17th day of April, 1909, the said Daniels-Jones Company was the owner of all of said lands and the holder of said contract and of the notes given by the said purchaser, Peterson, for the deferred payments on said contract and that said contract called for interest on all
53 deferred payments thereon at the rate of six per cent per annum and that no part of said notes had ever been paid at said date and that no part thereof has been paid to this time by anyone.

V.

That on or about January 20, 1909, the said Carl Peterson pretended to convey all his right, title and interest in said contract, or agreement, to the above named defendant, Henry H. Kryger; and that on the 24th day of February, 1909, the said defendant, Henry H. Kryger, made his affidavit before Walter H. Gould, Notary Public in and for Hennepin County, Minnesota, reciting that he held a contract for a deed in trust contract executed by Daniels-Jones Company dated January 9, 1909, which covers all of sections 7, 9, 15 and 17, all in Township 143, Range 72, in Kidder County, North Dakota, being the lands involved in this action, and that on March 1, 1909, at — o'clock A. M. said affidavit was filed for record in the office of the Register of Deeds of Kidder County North Dakota, and was recorded in Book D of Miscellaneous Records at page 230 thereof.

OPY

VI.

That on April 17, 1909, the said Daniels-Jones Company by and through its Secretary and Treasurer, H. T. Daniels, made its Notice of Cancellation of the aforesaid contract and addressed the same to the defendant, Carl Peterson, and to the defendant, Henry H. Kryger, and gave notice that default existed in the terms and conditions of said contract and that the default consisted in failure to pay to said Daniels-Jones Company on March 1, 1909, the sum of $1,280.00 and on the 1st day of April, 1909, the sum of $2,560.00, with interest on each of said sums at six per cent per annum from the date of said contract, and that at the date of such notice said amounts and interest remained overdue and unpaid and said default existed and notice was thereby given to said defendants that unless on or before thirty days after the service of such notice upon them such amount of money and interest was paid to said Company at 311 Security Bank Building, Minneapolis, Minnesota, and all the terms and conditions of said contract which were to be performed by said defendants were fully complied with said contract would
54 be cancelled and terminated and all the right, title and interest of said defendant, Carl Peterson, and said defendant, Henry H. Kryger, thereunder and in and to the lands and property covered thereby would be forfeited and cancelled; and that upon the execution of said Notice of Cancellation the same was by said Company placed in the hands of the Sheriff of Kidder County, North Dakota, for service upon the said Carl Peterson and the said Henry H. Kryger and that said sheriff on April 15, 1909, made his return of no service thereof and that said defendants could not be found in said county of Kidder; and that said Notice of Cancellation was thereupon served upon said defendants, Carl Peterson and Henry H. Kryger, by publication in the Kidder County Herald, a weekly newspaper of general circulation printed and published in the City of Steele, County of Kidder and State of North Dakota, and that said notice was published therein for a period of three consecutive weeks and was published therein on May 1, 1909, May 8, 1909, and May 15, 1909; and that on the 4th day of January, A. D. 1910, Harvey T. Daniels, the Secretary and Treasurer of said Daniels-Jones Company, made his affidavit for and in behalf of said Company, that the service of said notice upon said Carl Peterson and Henry H. Kryger was completed prior to July 1, 1909, and that the said purchasers had not paid to said Daniels-Jones Company any sum of money whatever to apply on the amount due on said contract as stated in said notice, and that no person has paid or tendered to said Company on behalf of said purchasers to apply on the amount named in said notice any sum of money whatsoever and said contract is wholly and in all respects terminated and cancelled, and that said Notice of Cancellation and the return of the Sheriff of Kidder County of no service thereof and the Printer's Affidavit of Publication of such notice in the said Kidder County Herald and the said affidavit of Harvey T. Daniels of non-redemption were each and all filed for record in the office of the Register of Deeds of the County of Kidder,

POOR

State of North Dakota, on the 3rd day of December, 1910, at 1 o'clock P. M. and were recorded in Book 29 of Miscellaneous Records at page 81 thereof.

VII.

That on January 3, 1911, at 4 o'clock P. M. the defendant,
55 Henry H. Kryger, filed for record in the office of the Register of Deeds of said county his pretended contract with the defendant, William Piper, wherein and whereby the defendant, Kryger, pretended to convey to the defendant, William Piper, a one-half interest in the aforesaid contract between the Daniels-Jones Company and the defendant, Carl Peterson, which said pretended contract was then and there recorded in Book E of Miscellaneous Records at page 215 and that the claim or claims of the defendants, Carl Peterson, Henry H. Kryger and William Piper, and all of the defendants herein is based solely and wholly upon the aforesaid contract between the Daniels-Jones Company and the defendant, Carl Peterson.

VIII.

That on October 5, 1911, at 10 o'clock A. M. a Notice of Lis Pendens was filed by the plaintiff herein in the office of the Register of Deeds of Kidder County, North Dakota, and was recorded in Book 1 of Lis Pendens records at page 122 thereof, and that such notice gave notice of the pendency of this action and that the same was brought to quiet title to the above lands and said notice gave the name of the plaintiff and the defendants in this action.

IX.

That on or about September 29, 1911 the plaintiff was negotiating with one Will B. Chase to sell the said Chase the East one-half of said Section 9, All of said Section 15, and All of said Section 17, and that on said day said plaintiff and his wife, Ida Smith Wilson, executed their Warranty Deeds therefor in favor of said Will B. Chase but that no sale of said lands last mentioned or any part thereof was consummated with said Will B. Chase until after the commencement of this action, and that none of said deeds so executed by said plaintiff and his wife to said Will B. Chase were delivered by plaintiff to said Will B. Chase or to anyone else for him until after the commencement of this action, and not until October 6, 1911,
56 and that said deeds last mentioned were filed for record in the office of said Register of Deeds October 26, 1911 at one o'clock P. M.

X.

That service of the aforesaid notice of cancellation of the said Peterson contract upon the defendants, Carl Peterson and Henry H. Kryger, was completed prior to the first day of July 1909 and that

COPY

the promissory notes of said Peterson corresponding with the deferred payments mentioned in said contract were executed by said Peterson and delivered to the said Daniels-Jones Company at the time of the execution of said contract and that after the cancellation of said contract by said Daniels-Jones Company as aforesaid and after the time for redemption stated in the notice of cancellation had expired the said Daniels-Jones Company wrote to the said Carl Peterson expressing the willingness and desire to surrender each and all of said notes to the said Carl Peterson and that the same would be surrendered on demand of said Carl Peterson but that no demand for the surrender thereof has ever been made and that the said notes have never been used by said Daniels-Jones Company and are now in the possession of said company ready for delivery to said Peterson and that at the time of the execution of said contract and at all times whatever up to and including the completion of the service of said notice of cancellation upon said defendants, Carl Peterson and Henry H. Kryger, and up to and including the time for the payments of the sums of money mentioned in said notice of cancellation and up to the time the period of redemption named in said notice had expired the said Daniels-Jones Company was ready, able and willing to deliver to said defendant, Carl Peterson, a Warrantly Deed to all of said lands and to convey to said Carl Peterson a merchantable title thereto and to give and deliver an Abstract of Title thereto and to make such delivery to any person other than the said Carl Peterson who might lawfully be entitled thereto by virtue of the said Peterson contract, but that no deed, or deeds,
57 therefor was ever demanded by said Carl Peterson or by anyone else under said Peterson contract, and that no money or thing of value whatever was paid to or tendered to said Daniels-Jones Company upon the aforesaid contract with Carl Peterson as consideration for said lands or any part thereof; and that said defendants did not, nor did either thereof, ever take possession of or exercise any acts of ownership over any of the lands described in said contract and in the complaint in this action.

XI.

That the plaintiff is the owner in fee simple of all the real property described in the plaintiff's complaint herein and in these Findings as All of Sections 7, 9, 15 and 17, Township 143, Range 72, in Kidder County, North Dakota, as against each and all of the above named defendants in the above entitled action.

From the foregoing Findings of Facts the Court makes and files the following.

Conclusions of Law.

I.

That the summons was duly and regularly served upon each and all of the defendant herein and that more than thirty days have

POOR

expired since such service of said summons was completed; and that the Court has full jurisdiction herein of each and all of the parties to the above entitled action and of the subject matter thereof, and that none of the said defendants have in any manner appeared herein, excepting the defendant, Henry H. Kryger, and that each and all of said defendants are now in default herein, excepting the defendant, Henry H. Kryger.

II.

That the plaintiff, Edward H. Wilson, is the owner in fee simple and is in possession and occupancy of the tracts of land described in the Findings of Facts herein, as against each and all of the above named defendants and as against all persons claiming by, through or under them or any thereof.

58

III.

That the contract for the sale of said lands dated January 19, 1909 made by the Daniels-Jones Company, a corporation, as the owner of said lands, and the defendant, Carl Peterson, as the purchaser, and referred to in the separate answer and counter-claim herein of the defendant, Henry H. Kryger, has been duly and legally cancelled and forfeited and that the defendants have not, nor have any thereof, any right, title, interest or claim in or to said lands or any part thereof as against this plaintiff, under and by virtue of the aforesaid contract with said Carl Peterson or under and by virtue of any other contract or claim of title or right.

IV.

That the aforesaid defendant, Carl Peterson, was in default on his said contract of purchase of said lands on the 17th day of April 1909 and that due notice of such default and of the wish and intention of the said Daniels-Jones Company to terminate the said contract was duly given to and served upon the defendants, Carl Peterson, and Henry H. Kryger, by publication in the Kidder County Herald, a weekly newspaper printed and published at Steele, North Dakota, in the month of May 1909, and that the time for redemption expired prior to July 1, 1909, and that no redemption whatever was made or attempted to be made of said lands or any part thereof by any of the above named defendants, or any other person, and that said contract has duly and legally been foreclosed.

V.

That the above named defendants and each and all thereof should be and are hereby forever enjoined and debarred from asserting any right, title to or interest in or lien upon said lands, or any part thereof, and that the title to the said lands described in the complaint herein, and all thereof, be and the same is hereby quieted in plaintiff,

COPY

and that Plaintiff is entitled to recover his costs and disbursements herein of and from the defendant, Henry H. Kryger, to be taxed and entered by the Clerk of this Court.

Let Judgment and Decree be entered herein accordingly.

59 & 60 Done in open Court at Steele, N. D. this 18th day of June, A. D. 1912.

By the Court:

W. H. WINCHESTER, *Judge.*

61 In District Court, Sixth Judicial District.

STATE OF NORTH DAKOTA,
County of Kidder, ss:

EDWARD H. WILSON, Plaintiff,
vs.
HENRY H. KRYGER, CARL PETERSON, and WILLIAM PIPER and All Other Persons Unknown Claiming any Estate or Interest in or Lien or Incumbrance upon the Property Described in the Complaint, Defendants.

Judgment and Decree.

It appearing from the records and files in the above entitled action that the summons in said action was duly served upon each and all of the defendants herein by publication as required by law and that such summons was personally served upon the defendant, Henry H. Kryger, at and within the County of Hennepin, State of Minnesota, on the 17th day of October 1911 and that the said summons was also personally served upon the above named defendant, William Piper, at and within the County of Ramsay, State of Minnesota, on the 23rd day of October 1911, and that more than thirty days have elapsed since the service of the said summons upon each and all of the defendants herein was completed and that no one of said defendants herein has in any manner appeared or answered herein excepting the defendant, Henry H. Kryger, who made, served and filed his answer to the plaintiff's complaint herein and that each and all of said defendants are in default excepting the defendant Henry H. Kryger, and that the Court has jurisdiction of this matter, and said action having been duly tried before the Court at a regular term thereof held at the Court House in the City of Steele, County of Kidder and State of North Dakota, on the 18th day of June A. D. 1912,

Now, Therefore, on Motion of Messrs. Stanley & Phelps, Attorneys for the plaintiff herein and on reading and filing the Findings of Facts Conclusions of Law and Order for Judgment and Decree made herein by the Court and dated June 18, 1912, it is ordered, adjudged and decreed that the Plaintiff, Edward H. Wilson, is the
62–71 owner by title in fee simple and is in the lawful possession and occupancy of each and all of the tracts and parcels of real property described in his complaint herein and in said Findings and Conclusions, situated in the County of Kidder, State of North Dakota, and described as follows, to-wit:

All of Sections numbered Seven (7), Nine (9), Fifteen (15) and Seventeen (17), in Township numbered One Hundred Forty-three (143), North, Range Seventy-two (72), West of the Fifth Principal Meridian, as against the above named defendants and each and all of them, and that the contract covering all of said tracts of land and mentioned in the separate answer and counterclaim herein of

COPY

the defendant, Henry H. Kryger, made between the Daniels-Jones Company, a corporation, and the defendant, Carl Peterson, on the 19th day of January 1909 was duly and legally concelled, terminated and foreclosed, by the said Daniels-Jones Company prior to July 1, 1909, and that at the time of such foreclosure and cancellation the said Carl Peterson and all persons claiming by, through or under him were in default on said contract and that the said contract was entitled to be terminated and foreclosed by the said Daniels-Jones Company, and that the said defendants above named and each and all thereof, should be and are hereby forever enjoined and debarred from asserting any right, title to or interest in or lien upon said lands or any part thereof, and that the title to the said lands, and all thereof, be and is hereby quieted in plaintiff, as against the defendants herein and all thereof and that the plaintiff have and recover judgment against the defendant, Henry H. Kryger, for his costs and disbursements herein taxed and allowed at the sum of Forty-seven dollars and twenty eight cents (47 28/100).

Witness the Hon. W. H. Winchester, Judge of the District Court in and for the Sixth Judicial District of the State of North Dakota, and my hand and the seal of said District Court of the County of Kidder therein, this ninth day of July A. D. 1912 at my office in the Court House in the City of Steele in said County.

[SEAL.]

M. F. WOESSNER,
Clerk of the District Court of
Kidder County, North Dakota.

* * * * * * *

72 STATE OF NORTH DAKOTA:

In Supreme Court, September, 1914, Term.

EDWARD WILSON, Plaintiff & Respondent,
vs.
HENRY H. KRYGER, Defendant & Appellant.

The Daniels-Jones Co., executed at Minneapolis, Minn., a contract for deed to one Peterson, for 2560 acres of land in Kidder County, this state, upon which an initial payment down had been made. The contract was assigned to defendant Kryger. Two installments became due and remaining unpaid, the company served notice of cancelation of the contract. It then sold and deeded the land to plaintiff, who brought this action to quiet title. Kryger defends, claiming, "that the place to cancel the contract was in Minnesota, where it was made, where it was to be performed and where the parties reside," that if cancellation under the laws of this state is allowed, he is denied the equal protection of the laws and deprived of his property without due process of law.

Held: That in this action to *pursue* the land the validity of the contract is directly involved in the suit to quiet title and the situs of

POOR

the action is fixed by the statute as in the county where the land is situated.

(2) That the statutory provision for cancellation or foreclosure of contracts by notice of default to be given relates to procedure and remedy concerning the enforcement of the contract against the land; and the situs of the suit and of the land govern- the procedure
73 and remedy to recover title to the land; and the cancellation made under the laws of this state furnishes sufficient evidence of defendant's default under said contract to sustain the conclusion of law drawn from the findings to the effect that all rights of the defendant to the land under said contract were terminated because of his defaults. The findings sustain the judgment entered.

(3) Under the findings and on the judgment roll there is no proof of the Minnesota law governing cancellation of this contract although the foreign law in such respect is immaterial. The law of the forum and of the situs of the real property control the method and procedure of cancellation of contracts in this suit involving title and where the contract was executed in a foreign state and without stipulating for performance to be had within this state.

(4) Defendant has appealed upon alleged error appearing upon the judgment roll only and without settling a statement of the case. Where a statement of the case is not settled and the questions to be raised on the appeal are not errors of law occur-ing on the trial but instead only errors appearing on the face of the judgment roll, no specification of error need be taken at all and no specification of error therefore need be served with the notice of appeal or at all. All that is necessary to have such error appearing on the face of the judgment roll only reviewed is to assign and argue in the brief the error complained of. The insufficient specification of error here taken and served not being necessary is disregarded and the alleged error assigned in the brief on the judgment roll is passed upon.

(Syllabus by the Court.)

From a judgment of the District Court of Kidder County.
74 Hon. W. H. Winchester, judge.
Defendant appeals. Affirmed.

Opinion by Goss, J.

R. L. Phelps, of Steele, N. D. and Jesse Van Valkenburg, of Minneapolis, Minn., Attorneys for plaintiff and respondent.

W. W. Fry, of St. Paul, Minn., attorney for defendant and appellant.

75 Goss, *J.*:

This is an action to determine adverse claims. Defendant answers that he is interested as the holder of a contract of sale of the land involved. By reply it is alleged said contract was cancelled for defaults thereunder. Trial was had at a regular term, defendant failing to appear. On plaintiff's proof the Court made findings conclusions and order for judgment upon which judgment was entered quieting title in plaintiff. Defendant's appeal is governed by Chap.

COPY

131, Laws of 1913, as was held in this action, Wilson v. Kryger in 26 N. D. 77, 143 N. W. 764. Subsequently and pending this appeal portions of appellant's brief on motion were stricken together with certain matter not properly a part of the judgment roll. The case is now for decision upon error assigned upon the judgment roll and upon that alone as there is no settled statement of the case and hence nothing reviewable except error as assigned in appellant's brief upon the judgment roll proper.

In the opinion written in this action upon motion to dismiss this appeal in 26 N. D. 77, 143 N. W. 764, appear statements concerning the specification of errors of law there permitted to be served after time. It was assumed that the taking and service of said specification was necessary as a prerequisite to an assignment of error and review in this Court. What was there said was under the apprehension that a statement of the case would be used on appeal and that the same would therefore be necessary accordingly to raise alleged errors occur-ing on the trial. The justice who prepared said opinion has also since written the opinion in Leu v. Montgomery, 28 N. D. —— 148 N. W. 662, wherein it is held that in an appeal taken to review alleged error on the judgment roll alone, no specification of errors of law need be taken at all. Nor in such an appeal on the judgment roll alone need there be any specification of errors of law either taken or served. "It was not the purpose in the enactment of Sec. 4, (Chap. 131 S. L. 1913, now Sec. 7656, C. L. 1913) to require any statement or specification to be thus served except in cases where under the former statute, Sec. 7058, R. C. 1905, 76 the same were required to be incorporated in a statement of the case and it is of course true that no such specifications were required under Sec. 7058, in order to enable the Court to review rulings appearing upon the judgment roll proper. In such case it is only necessary for the appellant to assign such ruling as error in his brief. To make our position plain, the words 'errors of law' as used in Sec. 4, of the new practice act should be construed as referring only to errors of law occurring at the trial and which, in order to be brought to the attention of the Court under the former practice had to be specified in the settled statement of the case, and that they have no reference to errors appearing upon the face of the record proper." Mention is made of this for the reason that appellant in attempting to comply with permission granted in the former hearing in this Court of this appeal, served a so-called specification of error, but which specification as such is wholly insufficient to raise any error on the judgment roll. As it was unnecessary, however, to take or serve any specification of error this one served may be disregarded. Consideration will now be given to appellant's brief.

The three briefs filed by appellant while somewhat indefinite as to error assigned are sufficient to raise the principal question of whether the conclusion of law, that the contract of sale under which appellant claims an interest in the premises was canceled is the correct legal deduction from the facts found in the findings as supplemented by those admitted in the pleadings. And this is the question mainly discussed in the respondent's brief. The contracts

POOR C

in question are a part of the pleadings and their execution and delivery is admitted. The contract in question is one by the Daniels-Jones Co., to Carl Peterson, dated January 19, 1909, wherein said company agreed to sell to Peterson 2560 acres of land in Kidder
County, North Dakota, for $21,760 with $1.00 paid on said
77 purchase and the balance in installments, the first of which for $1280. matured the following March 1st. and $2560. the first of each month thereafter until November 1st. the date of the last installment. This contract was assigned immediately to Kryger, the appellant, who subsequently has contracted to sell a portion of said land to a co-defendant, Piper, the date of said agreement being December 30, 1910; that the Daniels-Jones Co., at the time of executing said contract of sale to Peterson owned the land. They subsequently have conveyed it to this plaintiff, Wilson, who owned it at the time of the commencement of this action. The contract given to Peterson is dated at Minneapolis, Minn., and does not stipulate for a place of performance. The findings establish that Peterson and Kryger defaulted in the payments due under the contract March 1st, and April 1st, and that on April 15, notice of cancelation, because of default was placed in the hands of the sheriff of Kidder County, North Dakota for service, who made return of inability to find either Peterson or Kryger, whereupon notice of cancelation was served by publication thereof in Kidder County for three weeks beginning May 1, 1909. Said notice thus served was to the effect that unless said defaults were cured by payment of all amounts due before thirty days after the service of said notice, the contract would be canceled and terminated. Subsequently, affidavit of publication together with affidavit of non-redemption from said contract were filed for record. Deeds to this plaintiff were filed for record June 6, 1910, and May 15, 1911. On March 1, 1909, Kryger filed his affidavit for record, therein reciting that he held a contract for deed. Service of notice of cancelation was completed prior to June 1, 1909, and said purchasers had not paid to said company any sum of money whatever, nor had any payments been made on said contract except the initial payment of $1.00; after cancelation was affected the company notified Peterson that it was willing to sur-
render all his notes evidencing said defaulted payments and
78 that they would be surrendered on his demand but they were not called for. Neither of said defendants have ever had possession of nor have exercised any ownership over the lands in question. The answer pleads Sec. 4442 of the R. L. of Minnesota of 1905, and plaintiff in his reply admits that said section reads "as set forth in the answer."

Under these facts appellant contends in his brief that the contract was not canceled and that the findings do not support the conclusion of cancelation. "That the place to cancel this contract is in the state of Minnesota where it was made, where it was to be performed and where the parties reside; and (2) that the judgment appealed from is of no force of effect for the reason that its enforcement by the State of North Dakota abridges the privileges and immunities of a citizen of Minnesota and denies him the equal pro-

OPY

tection of the laws and deprives him of his property without due process of law as guaranteed to him by Art. 14, of the Federal Constitution and that the judgment has an extra territorial effect in depriving a citizen of Minnesota of his property rights under and by virtue of a contract made and enforceable in Minnesota."

The foreign statute is a fact to be established. Cosgrave v. McAvay, 24 N. D. 343. Though the answer recites Sec. 4442 of the R. L. of Minnesota, 1905 and the admission is made in the reply that the same reads as stated it is no proof that the same was in effect or was unchanged or unamended or was the law of that state at the time this contract was entered into nor is it claimed to have been such in the answer and defendant has failed to prove the fact of what the foreign law was at the time the parties entered into this contract. The presumption would then apply that the common law prevailed and governed the parties at that time and subsequently. C. L. 1913, Sec. 7936, Subdivision 41. Indeed, in respondent's brief attention is called to an alleged amendment to the section of
79 the Minnesota statute quoted, claimed to have been effective at or before the time of the cancellation of this contract. As the proof of the foreign law applicable to this contract at the particular time in question and which must have been a part of the evidence in the case is not before us and the record is otherwise uncertain as to what said law was in fact, no presumption will be indulged in, and it will be regarded as a failure of proof of the fact of the foreign law governing cancellation of this contract, conceding that its cancellation depended upon a compliance with the Minnesota instead of the North Dakota statutes as to cancellation of the land contract after default.

This action is one in pursuit of the land, drawing in question the validity of this contract for sale of land. That the action is for realty and is in no sense a personal one must not be lost sight of. Defendant has over-looked this distinction. As such the action is local and not transitory. Not incidently, but primarily, this action is "for the recovery of real property or an estate or an interest therein," under defendant's own pleading. Sec. 7415 C. L. 1913 fixes the situs of such a suit as within the county wherein the land lies. And if defendant's contention be true and his contract of sale enforceable against the land he is an equitable owner thereof, the vendor holding the legal title in trust for him and as security for the purchase money. 57 L. R. A. 643, note. Accepting his claims at face he is in the Courts of this state seeking specific performance with a view of obtaining a decree, awarding him title to land here situated. The question of the validity of his contract so asserted for such purposes is directly involved and is challenged by plaintiff's claim, that cancellation thereof was had in conformity to the laws of this state. Defendant answers that the cancellation thus affecting title to land here situated and in litigation must be determined according to lex loci contractus instead of lex rei sitae. His claim is unsound for the reason the question is one of remedy, that is, pro-
80 cedure involved in the enforcement of the contract and the procuring of title analogous to the foreclosure of a mortgage or an action to specifically perform. That it is a course of statutory

POOR

procedure used and invoked against defendant to defeat his equitable title in no wise changes the fact that it is a statute relating to a remedy, namely; the manner of for-closure of land contracts. Defendant can no more urge necessity for cancellation of this contract under the Minnesota law than he could that he should cast his pleadings and form of action to obtain title to this land under and according to the foreign law. Both relate to matters of remedy in the enforcement of this contract to land here situated. Sec. 8119-8121 C. L. 1913. The statute on cancellation is but provision for a certain kind of evidence of default. It is not a substantive law provision, but rather evidentiary. Such provisions pertain to the law of the forum. Wharton on Conflict of Laws (3d Ed.) Sec. 690. "That matters respecting remedy depend upon the law of the place where suit is brought is universally conceded." Wharton Con. Laws, Sec. 675A, "When the law involved is a statute it is a question of construction whether the law is addressed to the necessary constituent elements or legality of the contract on the one hand or to the evidence by which it shall be proved on the other. In the former case the law effects contracts made within the jurisdiction wherever sued; in the latter it applies to all suits within the jurisdiction wherever the contracts sued upon were made." Wharton Conflict Laws, Page 1436 quoted from Emery v. Burbank, 163 Mass. 326, 39 N. E. 1026, 47 A. S. R. 456, 28 L. R. A. 57. This is not a contract primarily of security and therefore the case is not analogous to security transactions; nor is it an action for damages brought under the law of the place of the contract for breach of said contract to convey land in another state as is illustrated by Finnes v. Selover, Bates & Co., (Minn.) 113 N. W. 883, or Walsh v. Selover, Bates & Co., (Minn.) 123 N. W. 291, appealed to the Federal Supreme
81 Court and decided in 226 U. S. 112, and here relied upon by appellant. The action is not personal and transitory but real and local. Neither is title involved as incidental to equitable relief awarded in a jurisdiction foreign to the land; nor is there here any question of enforcement of a contract affecting realty valid where made but invalid where the land is situated. The contract when executed was valid both there and here. It has been canceled according to the law of the forum and the situs of the realty. The law of the forum will recognize no foreign law touching cancellation, in other words, pertaining to the enforcement or non-enforcement of this contract in this suit involving particular real property by our statute necessarily local to the county where the real property is situated. Secs. 8119 to 8122 C. L. 1913. The distinction between this suit and the so-called Selover cases is clearly drawn in Selover, Bates & Co., v. Walsh, 226 U. S. 112, at page 123 in the following language: "the contention is that the statute as applied affected the transfer of land situated in another state and out side of, therefore, the jurisdiction of the State of Minnesota. In other words, it is contended that the law of Colorado, the situs of the property, is the law of the contract. The principle cannot be contested but plaintiff in error pushes it too far. Courts in many ways through action upon or constraint of the person affect property in other states and in the

OPY

case at bar the action is strictly personal. It in no way affects the land or seeks any remedy against it. The land had been conveyed to another by plaintiff in error and it was secure in the possession of the purchaser. Redress was sought in a Minnesota court for the violation of a Minnesota contract, and, being such the law of Minnesota gave the right and measure of recovery." But the recovery sought was for damages and as stated in the opinion the land was not affected nor was a remedy sought against it. The decisions cited are not applicable; on the contrary see note to Clement v. Willett, 17 L. R. A. (N. S.) 1094, citing authority that, "it is obvious,
82 of course, that the lex fori prevails over lex rei sitae, the lex loci contractus, the lex loci solutionis, and all other laws so far as concern matters that relate to the remedy as distinguished from the substantive contract." • • • "And the necessity of alleging facts avoiding the grantor's attempted release of the grantee from the assumption of a covenant is also determined by the lex fori," and other illustrations are given. See note to Smith v. Co. 26 L. R. A. (N. S.) 927-941, and to Bank v. Doherty, 4 L. R. A. (N. S.) 1191, and to Fall v. Easton 23 L. R. A. (NS) 924, Note to 17 L. R. A. N. S. 1094 and extensive note to Procter v. Procter, 69 L. R. A. 673, particularly summary at page 696; and Bullett v. Exy Land Co., 36 S. W. 16 (Ky.) 39 Cys. 1435; Polsom v. Stewart 167 Mass. 211. 36 L. R. A. 771; Cosgrave v. McAvay, 24 N. D. 343, 139 N. W. 693 decisive of many of these questions.

Defendant desires a decision on his second assignment of error particularly set out in detail earlier in this opinion in which he claims our holding (1) denies him equal protection of the law and, (2) deprives him of his property without due process of law. Considering the last first, he is in no position to urge that the cancellation effected operated to divest him of his property without due process of law. On the face of the findings, back of which this Court cannot go because the evidence upon which the findings are based has not been brought into the record, defendant was in default and the contract was adjudged canceled and he decreed to have no interest in said real property. The decree was entered after his appearance in an action in which he has had his day in Court. His rights were not necessarily canceled by the notice of cancellation served. Defendant has erroneously assumed the contrary. Service of notice of cancellation does not alone necessarily divest him of any rights. It is but a step required by statute to be taken to lay the basis for rights afterwards to be adjudged if necessary by Court action. The steps taken but furnish evidence of default whether insufficient or conclusive to depend upon the other considerations. It is hard to see then where the defendant has been deprived of his prop-
83 erty without due process of law, he having had his day in Court and title being quieted against him by Court decree. In no way has his rights been shortcircuited.

As to whether the privileges and immunities of the defendant as a citizen of Minnesota have been invaded and he been denied equal protection of the laws has already been decided adversely to his contention in the very case he cites, that of Selover, Bates & Co., v. Walsh, 226 U. S. 112, holding that, "the test of equal protection

POOR

of law is whether the parties are all treated alike in the same situation." Defendant, as a non-resident, is treated no differently from any resident holder of a contract on lands within this state. The same rules apply to foreclosure of interest therein against all parties residents and non-residents and without discrimination. "All parties are treated alike in the same situation" and the test is satisfied. The judgment of the district Court is affirmed with costs. It is so ordered.

E. B. GOSS.
A. A. BRUCE.
EDWARD T. BURKE.
C. J. FISK.

I concur in the result.

B. F. SPALDING.

84–108 On the 12th day of November, A. D. 1914, there was filed in this court the following Order for Judgment:

File No. 2603.

EDWARD H. WILSON, Plaintiff and Respondent,
vs.
HENRY H. KRYGER, Defendant and Appellant.

Appeal from the District Court of Kidder County.

STATE OF NORTH DAKOTA,
In the Supreme Court, ss:

This action coming on to be heard at the September A. D. 1914 term of this Court, at the Supreme Court room, in the City of Bismarck, State of North Dakota;

Present: Burleigh F. Spalding, Chief Justice; Charles J. Fisk, Edward T. Burke, Evan B. Goss and Andrew A. Bruce, Associate Justices, and the appeal herein having been submitted by W. W. Fry for the Appellant and by R. L. Phelps and Jesse Van Valkenburg for Respondent and the Court having advised thereon, it is now here considered, ordered and adjudged that the judgment of the said District Court within and for said Kidder County appealed from herein, be and the same is hereby affirmed.

And it is further ordered, That this cause be and it is hereby remanded to the District Court for further proceedings according to law, and the order of this court.

And it is further considered and adjudged, That Respondent have and recover of the Appellant costs and disbursements on this appeal, expended, to be taxed and allowed in the District Court.

Dated November 12, 1914.

By the Court,

[SEAL.]

B. F. SPALDING,
Chief Justice.

Attest:

R. D. HOSKINS, *Clerk.*

* * * * * * *

OPY

109 On the 15th day of February, A. D. 1915, there was filed in this court the following Petition for Writ of Error, Assignments of Errors and Prayer for Writ of Error:

Supreme Court of North Dakota.

EDWARD H. WILSON, Plaintiff & Respondent,
vs.
HENRY H. KRYGER, Defendant & Appellant.

Petition for Writ of Error, Assignment and Prayer.

Considering himself aggrieved by the final decision of the Supreme Court in rendering judgment against him in the above entitled case, the Defendant hereby prays a writ of error from the said decision and judgment to the United States Supreme Court, and an order fixing the amount of a cost bond.

And the said Henry H. Kryger assigns the following error in the records and proceedings of the said case:

The Supreme Court of North Dakota erred in holding and deciding that the land contract, dated January 20, 1909, between Daniels-Jones Company and Carl Peterson of Minneapolis, Minnesota, and assigned by said Carl Peterson to Defendant of Minneapolis, Minnesota, and made and executed at Minneapolis, in the State of Minnesota, was cancelled by a cancellation proceeding, pursuant to the laws of North Dakota, instituted and pretended to have been made by publishing a Notice of said cancellation in a newspaper in the County of Kidder and State of North Dakota, addressed to Defendant at Minneapolis, Minnesota. The validity of said cancellation proceeding was denied and drawn in question by the Defendant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

The said errors are more particularly set forth as follows:

110 1. The Supreme Court of North Dakota erred in holding and deciding that said alleged cancellation proceeding above mentioned, did not abrid-e the privileges and immunities of citizens or of this Defendant as guaranteed by the Fourteenth Amendment of the Federal Constitution.

2. That said cancellation proceeding as applied to this Defendant, did not impair the obligation of contracts contrary to the provisions of the Federal Constitution. Article 1, Section 10.

For which errors the Defendant, Henry H. Kryger, prays that the said Judgment of the Supreme Court of the State of North Dakota, dated November 12, 1914, be reversed and a judgment rendered in favor of the Defendant, Henry H. Kryger, to the effect that said alleged cancellation proceedings were void and of no force or effect and that said contract was not cancelled and for costs.

Dated St. Paul, Minnesota, December 15, 1915.

WILLIAM W. FRY,
Attorneys for Henry H. Kryger, 601–4
Commerce Bldg., St. Paul, Minn.

POOR C

STATE OF NORTH DAKOTA:

Supreme Court.

Let the writ of error issue upon the execution of a bond by Henry H. Kryger to Edward H. Wilson in the sum of Twenty-five hundred ($2500.) Dollars.

Dated December 22, 1914.

B. F. SPALDING,
Chief Justice Supreme Court of North Dakota.

111 Fidelity and Deposit Company of Maryland.

Home Office: Baltimore, Maryland.

Supreme Court of North Dakota.

HENRY H. KRYGER, Plaintiff in Error,
vs.
EDWARD H. WILSON, Defendant in Error.

Bond.

Know all men by these presents, That we, Henry H. Kryger, as principal and the Fidelity and Deposit Company of Maryland, a corporation of Baltimore, Maryland, as surety, are held and firmly bound unto Edward H. Wilson in the sum of Twenty-fice Hundred ($2500.00) Dollars to be paid to said Edward H. Wilson, to which payment well and truly to be made, we bind ourselves jointly and severally firmly by these presents.

Sealed with our seals and dated this 25th day of January, A. D. 1915.

Whereas, the above named Plaintiff in Error seeks to prosecute its writ of error to the United States Supreme Court to reverse the judgment rendered in the above entitled action by the Supreme Court of North Dakota.

Now therefore, the condition of this obligation is such that if the above named Plaintiff in Error shall prosecute its said Writ of Error to effect, and answer all costs that may be adjudged if it shall fail, to make good its plea, then this obligation to be void, otherwise to remain in full force and effect.

In witness whereof, We have hereunto set our hands and seals this 25th day of January A. D. 1915.

(Signed) HENRY H. KRYGER, [SEAL.]
(Signed) FIDELITY AND DEPOSIT COMPANY OF MARYLAND,
By FITZ BURNS,
Attorney in Fact.

Attest:
M. H. COWTHER, *Agent.*

Signed, Sealed and Delivered in presence of

ALOY MENSING,
E. M. BLACKE,
As to Principal.
M. E. HAWKINS,
J. M. SWIFT,
As to Surety.

Countersigned by

J. ARTHUR CUNNINGHAM,
Authorized Representative, Williston, N. Dak.

112 STATE OF MINNESOTA,
County of Ramsey, ss:

On this 25th day of January A. D. 1915, before me personally appeared Henry H. Kryger known to me to be the person who is described in and who executed the within instrument, and acknowledged to me that he executed the same.

[SEAL.] ALOY MENSING, (Signed)
Notary Public, Ramsey County, Minn.

My commission expires December 12th, 1919.

STATE OF MINNESOTA,
County of Ramsey, ss:

On this 25th day of January, 1915, before me, M. E. Hawkins, a Notary Public in and for said County and State, personally appeared Fitzhugh Burns, known to me to be the Attorney-in-fact of the corporation that is described in and that executed the annexed instrument and acknowledged to me that such corporation executed the same.

[SEAL.] M. E. HAWKINS, (Signed)
Notary Public, Ramsey County, Minn.

My commission expires August 2, 1918.

The within bond is hereby approved.
Dated Jan. 26, 1915.

C. J. FISK,
Chief Justice Supreme Court N. Dak.

113 *Authentication of Record.*

SUPREME COURT, STATE OF NORTH DAKOTA, *ss:*

I, D. Hoskins, Clerk of said Court, do hereby certify that the foregoing is a true, full and complete transcript of the record and proceedings in the case of Henry H. Kryger vs. Edward H. Wilson, and also of the opinion of the Court rendered therein as the same now appears on file in my office.

POOR

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in Bismarck, North Dakota, this 24 day of March A. D. 1915.

[Seal Supreme Court, State of North Dakota.]

R. D. HOSKINS,
Clerk Supreme Court of North Dakota.

114 Supreme Court, United States.

Docket Number 909.

HENRY H. KRYGER, Plaintiff in Error,
vs.
EDWARD H. WILSON, Defendant in Error.

The Plaintiff in Error herewith files with the Clerk of this Court the statement of the errors on which he intends to rely.

1. The Supreme Court of North Dakota erred in holding and deciding that the land contract dated January 30, 1909, between Daniels-Jones Company and Carl Peterson of Minneapolis, Minnesota, and assigned by said Carl Peterson to Defendant (now Plaintiff in Error) of Minneapolis, Minnesota, and made and executed at Minneapolis, in the State of Minnesota, was cancelled by a cancellation proceeding pursuant to the laws of North Dakota, instituted and pretended to have been made by publishing a Notice of said Cancellation in a newspaper in the County of Kidder, State of North Dakota, addressed to Defendant (now Plaintiff in Error) at Minneapolis, Minnesota. The validity of said cancellation proceeding was denied and drawn in question by the Defendant on the ground of its being repugnant to the Constitution of the United States and in contravention thereof.

2. That the Supreme Court of North Dakota erred in holding and deciding that said alleged cancellation proceeding above mentioned did not abridge the privileges and immunities of citizens or of this Defendant (Plaintiff in Error) as guaranteed by the Fourteenth Amendment of the Federal Constitution.

3. That the Supreme Court of North Dakota erred in holding and deciding that said cancellation proceeding as applied
115 to this Defendant (Plaintiff in Error) did not impair the obligation of contracts contrary to the provisions of the Federal Constitution, Article 1, Section 10.

4. That the parts of the record which Plaintiff in Error thinks necessary for the consideration thereof are as follows:

1. Complaint.
2. Affidavit for Publication of Summons.
3. Affidavit for mailing copies and No. Answer.
4. Answer and counterclaim with Exhibit "A" and "B" attached.
5. Reply.
6. Findings of Fact and Conclusions of Law and Order for Judgment.

OPY

7. Judgment and Decree.
8. Decision of Supreme Court of North Dakota, made on or about November 12, 1914.
9. Petition for Writ of Error, Assignment and Prayer and Order of Supreme Court of North Dakota on same.
10. Writ of Error with allowance of same.
11. Bond filed by Plaintiff in Error for $2500.00.
12. Certificate of Lodgment.
13. Citation with admission of service.
14. Authentication of Record.
15. Return of Writ.
16. Letter of Clerk of Supreme Court of North Dakota forwarding Transcript of record.
17. Docket of case in Supreme Court of United States.

O. E. HOLMAN AND
WILLIAM W. FRY,
Attorney- for Plaintiff in Error.

116 STATE OF NORTH DAKOTA,
County of Kidder, ss:

Mary A. Zerwas, being first duly sworn on oath says that on the 25th day of June, 1915, at Steele, Kidder County, North Dakota, she served the hereto attached statement of errors in the case of Henry H. Kryger vs. Edward H. Wilson, upon Rees L. Phelps, Attorney for defendant in error, Edward H. Wilson, by personally delivering to and leaving with said Rees L. Phelps, a true and correct copy thereof.

MARY A. ZERWAS.

Subscribed and sworn to before me this 25th day of June, 1915.

[Seal Jno. C. Loerch, Notary Public, State of North Dakota.]

JNO. C. LOERCH,
Notary Public, Kidder County, North Dakota.

My commission expires Nov. 5, 1916.

117 STATE OF MINNESOTA,
County of Ramsey, ss:

William W. Fry, being first duly sworn, says; that on the 30th day of June 1915, at Minneapolis, Minnesota, he served the attached statement of errors and parts of the record to be printed in the case of Henry H. Kryger vs. Edward H. Wilson, upon Jesse Van Valkenburg, attorney for Defendant, by personally delivering to and leaving with said Jesse Van Valkenburg a true and correct copy thereof.

WILLIAM W. FRY.

POOR

Subscribed and sworn to before me this 2nd day of July, 1915.

[Notarial Seal, Ramsey Co., Minn.]

MARK H. SEHAR,
Notary Public, Ramsey County, Minnesota.

My commission expires Nov. 28, 1920.

118 [Endorsed:] 421-'15. 24,653. Supreme Court, U. S. Henry H. Kryger, Plaintiff in Error, vs. Edward H. Wilson, Defendant in Error. Statement of Record for Printing and Errors. Actually received, Sunday, July 4, 1915.

119 [Endorsed:] File No. 24,653. Supreme Court, U. S. October term, 1915. Term No. 421. Henry H. Kryger, Pl'ff in Error, vs. Edward H. Wilson. Statement of errors to be relied upon and designation by plaintiff in error of parts of record to be printed, and proof of service of same. Filed July 5, 1915.

Endorsed on cover: File No. 24,653. North Dakota Supreme Court. Term No. 421. Henry H. Kryger, plaintiff in error, vs. Edward H. Wilson. Filed April 5th, 1915. File No. 24,653.

COPY

FILED
JAN 28 1916
JAMES D. MAHER
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. [redacted]99

HENRY H. KRYGER, PLAINTIFF IN ERROR,

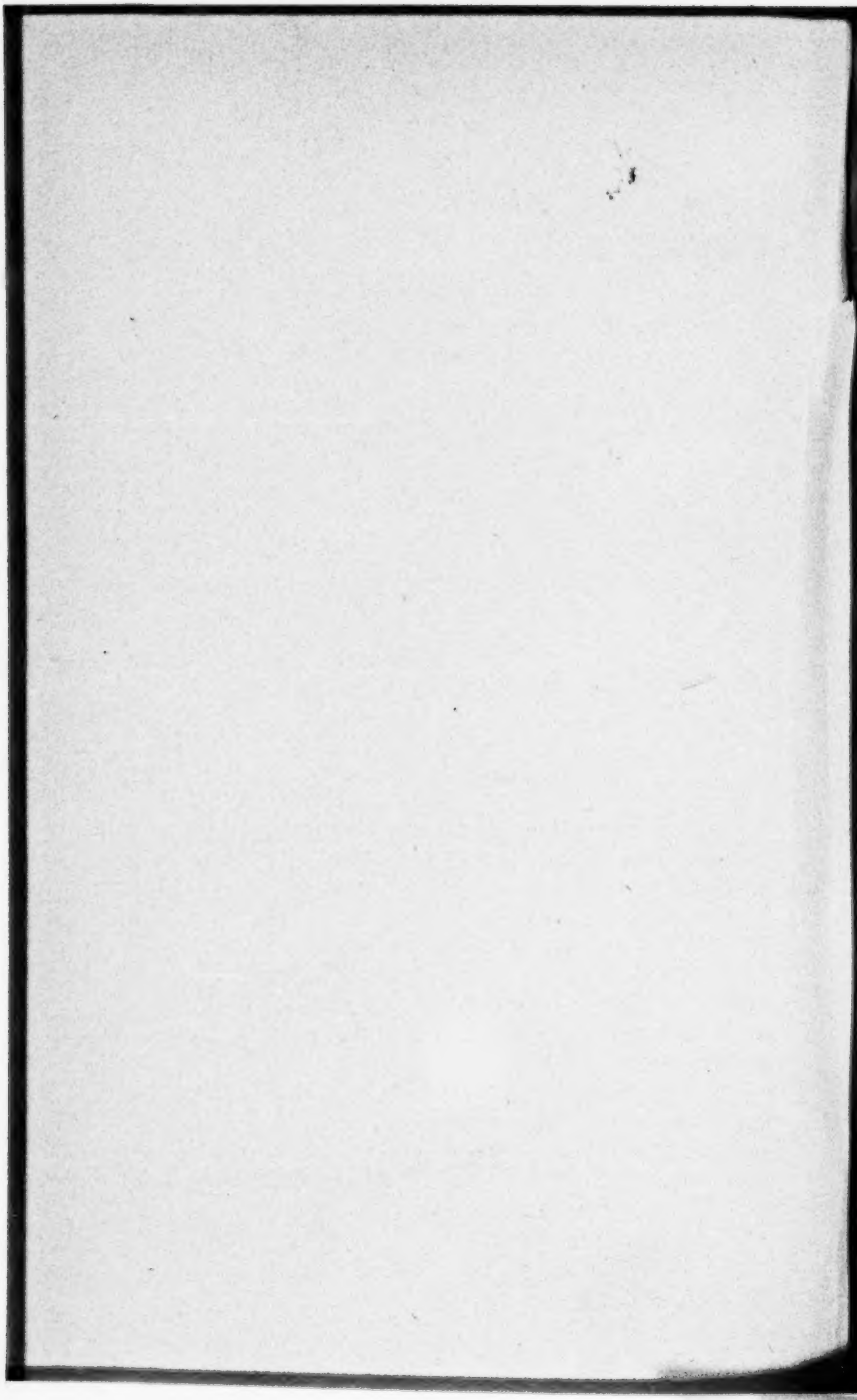
vs.

EDWARD H. WILSON.

BRIEF FOR THE PLAINTIFF IN ERROR.

O. E. HOLMAN,
WILLIAM W. FRY,
Counsel for the Plaintiff in Error.

(24,653)



POOR

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1915.

No. 421.

HENRY H. KRYGER, PLAINTIFF IN ERROR,

vs.

EDWARD H. WILSON.

BRIEF FOR PLAINTIFF IN ERROR.

Statement of the Case.

This is an action brought in the District Court of Kidder County, North Dakota, by Edward H. Wilson, grantee of the Daniel-Jones Company, against the plaintiff in error, Henry H. Kryger, for the purpose of quieting the title in Edward H. Wilson to certain real estate situate in Kidder County, North Dakota, to which said Kryger had a contract of purchase from Daniel-Jones Company and which said contract the Daniel-Jones Company had pretended to cancel by proceedings in North Dakota.

The Daniel-Jones Company, a corporation, at Minneapolis, in the State of Minnesota, on the 19th day of January, 1909, made an earnest-money contract of sale of real estate with one Carl Peterson, of Minneapolis, Minnesota,

OPY

ARGUMENT AND AUTHORITIES.

As we have stated before, the only question now before this court is the constitutionality of the decision of the Supreme Court of North Dakota as to this cancellation proceeding of the Daniel-Jones Company against Henry H. Kryger.

At the time this contract was made there were but three States having a law with reference to the cancellation of land contracts—Minnesota, North Dakota, and Iowa.

What was the special purpose of this law? Why such a law? We think we can answer. There were at the time these laws were passed much speculation in real estate in the Northwest, and purchasers of real estate in their enthusiasm often would purchase more land than they had the means to pay, and after they had paid part of their contract and became hard pressed for money and could not pay the balance unscrupulous vendors would simply write them a letter stating that they were in default and terminate the contract.

On April 7, 1909, less than three months after the contract was made, the Daniel-Jones Company proceeded in an attempt to cancel the contract without letting Henry H. Kryger know that they were doing it; also, it is significant that this notice of cancellation was addressed to him at Minneapolis, Minn., and it seems strange that a copy of this alleged cancellation notice was not served upon him at Minneapolis, Minn., where he lived and where the Daniel-Jones Company had their office and where he was to pay on his contract and where he was required to make up his default.

It would have been the most natural thing to have simply served Mr. Kryger at his office in Minneapolis. Would not any person who wanted Kryger to pay up on his contract have done the same? It seems natural that they should have. Have we not the right to assume that an ordinary person acting under like circumstances would have done so?

In thus considering this matter are we not forcing our-

selves to conclude that Daniel-Jones Company did not really want Henry H. Kryger to know that they were attempting to cancel the contract? They were very careful not to give him an opportunity to pay up on his contract. They sent the notice to the sheriff of Kidder County, North Dakota, and had him make a return that after due and diligent search and inquiry he was unable to find Henry H. Kryger in Kidder County, North Dakota. What a farce! The notice was addressed to Henry H. Kryger at Minneapolis, Minn. Of course, he couldn't be found in Kidder County.

Let us now be frank and candid. Why did they not place the notice in the hands of the sheriff of Hennepin County, Minn., instead of Kidder County, North Dakota, where the said Kryger lived and where he could be found? If this had been done, this litigation would not now be before this court.

The law of Minnesota with reference to cancellation of land contracts in force at the time of the making of said contract is as follows:

> "Section 4442, Revised Laws of 1905—Notice to Terminate Contract of Sale:
>
> "When default is made in the conditions of any contract for the conveyance of real estate or any interest therein whereby the vendor has a right to terminate the same he may do so by serving upon the purchaser, his personal representatives or assigns, a notice specifying the conditions in which default has been made and stating that such contract will terminate thirty days after the service of said notice unless prior thereto the purchaser shall comply with such conditions and pay the costs of service. Such notice must be given notwithstanding any provision in the contract to the contrary and shall be served in the same manner as a summons in the district court" (folio 11).

OOR COPY

> error pushes it too far. Courts in many ways through action upon or constraint of the person affect property in other States (Fall vs. Eastin, 215 U. S., 1; 23 L. R. A.), and in the case at bar the action is strictly personal."

The contract between the parties involves certain rights, irrespective of where the subject-matter of the contract is located. It does not make any difference where the land is located. We are dealing with the contract. The contract does not give us the land. It is simply an agreement that upon payment of a certain sum of money we shall get a conveyance of the land. It is true that the form of conveyance of the land would have to conform to the law of the situs of the property. The courts of Minnesota, however, could order the Daniel-Jones Co., if they had jurisdiction of it, to convey the land in conformance with the law of North Dakota.

The existence or non-existence of a contract is now the question and whether the rights of the purchaser have been extinguished by the vendor in the cancellation proceeding.

In this Walsh case the Minnesota Supreme Court, after noting the difference between this case and the Finnes case, said:

> "While these differences exist they are of no material consequence. The contract here involved was a Minnesota contract. All negotiations leading up to its formation were had in Minnesota and all payments except taxes were to be made at defendant's office in this State."

A very instructive and interesting case, while not involving this particular law, yet in line with it, is the case of Folsom vs. Stewart, 167 Mass., 211; 36 L. R. A., 771. A contract made in North Carolina between a husband and wife, who were domiciled there, by which the covenants to surrender, convey and transfer all his rights to lands owned by her in Massachusetts was declared to be a North Caro-

lina contract and enforceable in Massachusetts notwithstanding that under the law of the latter State husband and wife were incapable of contracting with each other. To the objection that the laws of the parties' domicile could not authorize a contract between them as to land in Massachusetts it is answered:

> "Obviously, this is not true. It is true that the laws of other States cannot render valid conveyances of property within our borders which our laws say are void for the plain reason that we have exclusive power of the *res*, but the same reason inverted establishes that the *lex rei sitæ* cannot control personal covenants in purporting to be conveyances between persons outside the jurisdiction although concerning the thing within it whatever the covenant. The law of North Carolina could subject the defendant's property to seizure on execution and his person to imprisonment for failure to perform it. Therefore, on principle the law of North Carolina determines the validity of the contract."

II.

The process by which the obligations of a contract for the purchase of land is cancelled is not one of remedy, but one that goes to the essence or substance of a contract.

The Supreme Court of North Dakota erred in holding:

> "Defendant can no more urge necessity for cancellation of this contract under the Minnesota law than he could cast his pleadings and form an action to obtain title to his land under and according to a foreign law. Both relate to matters of remedy in the enforcement of his contract to land here situated. The statute on cancellation is but a provision for a certain kind of evidence for default. It is not a substantive law provision but rather evidentiary."
>
> "The word *remedy* as used in the statement that the law of the forum will govern in matters pertaining to the remedy means such matters as the character

COPY

and the form of action, the admissibility of evidence, procedure, the mode of redress, limitations, execution of judgments and the like. Thomas *vs.* Western Union Telegraph Co., 61 S. W., 501."

"The distinction between remedy and substantive right is incapable of exact definition. The difference is somewhat a question of degree. The constitution of Kansas contains the general provision that stockholders shall be liable to creditors of a corporation for an additional amount equal to their stock. Gen. St. of Kans., par. 1192, provides that each stockholder shall be liable to each creditor whose execution has been returned *nulla bona*. This statute does not merely provide a remedy for the enforcement of rights created by the constitution, but creates substantive rights which may be enforced in other jurisdictions in accordance with the forms of remedy there provided." Dexter *vs.* Edmands, 89 Fed., 467.

"The rule that matters pertaining to the remedy are governed by the forum always assumes that there is a contract upon which a remedy is sought. It cannot be *properly appealed to* to *determine the question of contract or no contract.* Hartman *vs.* L. & N. R. R. Co., 39 Mo. App., 88-100."

The question decided by the Supreme Court of North Dakota was that the contract itself was cancelled, the obligations of the contract were nullified. The question that was decided was not a question of remedy, but it was a question of the substantive right of the contract.

Justice Hunt, in Scudder *vs.* Union National Bank, 91 (U. S.), 406, says:

"Matters bearing upon the execution, the interpretation and the validity of a contract are determined by the laws of the place where the contract is made. Matters connected with its performance are regulated by the law prevailing at the place of performance. Matters respecting the remedy, such as bringing of suits, admissibility of evidence, statutes of limitation depend upon the law of the place where the suit is brought."

POOR

Since the decision of the Walsh *vs.* Selover, Bates & Co. case by the Supreme Court of the United States the Minnesota Supreme Court has decided the question of the place where to cancel a land contract. We refer to the case of True *vs.* Northern Pacific Ry., 126 Minn., 72; — N. W., 948. Justice Hallam in writing the opinion says:

> "The mode of service of the notices of cancellation was not sufficient to terminate a land contract under the statutes of Minnesota (Laws 1897, p. 431; C. 233, G. S. 1913, sec. 8081). Plaintiff contends that these contracts were Minnesota contracts and that they could be cancelled only by compliance with Minnesota law. The land was located in the State of Washington. *Notwithstanding this fact the contracts might be Minnesota contracts, and if so, they could be cancelled only by compliance with the laws of Minnesota,*" and then the court says:
>
> "'We are of the opinion, however, that the contracts were Washington contracts. As stated, the land was located in that State. The negotiations were all had in that State. The contracts were delivered in that State and they provided for payments to be made at the office of the defandant's Assistant Land Commissioner, which office was at Tacoma in that State. Beyond question these facts made the contracts Washington contracts to be governed by the laws of that State as to the manner of performance, termination and discharge.'"

It now seems to us that the decision of the Supreme Court of the United States, *supra,* and this latter decision of the Supreme Court of Minnesota is conclusive upon the question as to the place where and the law under which the contract in the case at bar should have been canceled.

The reasons given why the contract in that case was a Washington contract if applied to the case at bar would conclusively determine that the contract in this case is a Minnesota contract.

OPY

From these decisions it seems clear to us that it has been established:

First. That this contract by the Daniel-Jones Company was a Minnesota contract.

Second. That the laws of Minnesota at the time of the making of the contract were part and parcel of it and governed the mode, method, and place of cancellation.

Third. That the cancellation of this contract in North Dakota was void and of no force or effect and any action in accordance with the statute of North Dakota had no bearing whatever upon this contract, where the cancellation was simply by published service of the notice.

III.

The cancellation proceeding as instituted in this case was not due process of law and is void as to the plaintiff in error.

The question before this court for determination is the constitutional question as to whether or not the cancellation procedure in North Dakota was due process of law. We have established that the North Dakota law had nothing whatever to do with the contract as far as the cancellation of it was concerned.

Mr. Kryger had a vested right in that contract and it could not be taken away from him except by due process of law.

> "Vested right is property arising from the principles of the common law which cannot be destroyed, divested or impaired by legislation. In cases where a contract is made in pursuance of a statute which also prescribes the parties against whom and the mode in which it may be enforced, the right to enforce it in the manner prescribed is part of the con-

POOR

tract and is not affected by a subsequent act repealing the provisions in reference to the enforcement of the contracts authorized by the statute under which it was made." Reyston *vs.* Miller (U. S.), 76 Fed., 5053.

The Constitution provision that no person shall be deprived of life, liberty or property without due process of law extends to *every Government proceeding which may interfere with personal or property rights, whether the proceeding be legislative, judicial, administrative or executive.*

Dorman *vs.* State, 34 Ala., 216.
Sherman *vs.* Buick, 32 Cal., 241; 91 A. R., 577.
Camp *vs.* Rogers, 44 Conn., 291.
Wilson *vs.* Baltimore, 5 Del. Ch., 524.
State *vs.* Height, 117 Ia., 650; 91 N. W., 935, 59, 437.

To give a judicial proceeding any validity if it involves merely the determination of the personal liability of the defendant he must be brought within its jurisdiction by service of process within the State or his voluntary appearance.

Pennoyer *vs.* Neff, 95 U. S., 714.
Brooks *vs.* Dun, 51 Fed., 138, 144; *Ex parte* Sticker (U. S.), 109 Fed., 145.
Caldwell *vs.* Armour (Del.), 43 Atl., 517.
Kemper Thomas *vs.* Shyer (Tenn.), 67 S. W., 856; 58 L. R. A., 173.

It is sufficient if a kind of notice is provided by which it is reasonably probable that the party proceeded against will be apprised of what is going on against him and an opportunty is offered to defend. Happy *vs.* Mosher, 48 N. Y., 313; Union Elevated of Brooklyn, 112 N. Y., 612; L. R. A., 351; Indianapolis *vs.* Hold, Cond., 57 N. E., 966; Gilchrist *vs.* Schmidling, 12 Kans., 263; Kansas City *vs.* Duncan, 37 S. W., 513; 135 No. 571.

COPY

In the case at bar Kryger had no opportunity of knowing that a cancellation proceeding was going on in North Dakota. There was not one effort made to apprise him of the fact that his land contract was being canceled. He lived in Minneapolis. The cancellation notice was prepared in Minneapolis. The Cancellation notice was addressed to him at Minneapolis and yet the cancellation proceeding was going on by publication in North Dakota, where Kryger never lived, where he never could get the notice, unless he was informed of it in some other way than by means of the process, and for that very reason it is not due process of law.

We do not think it is necessary to make any further comment upon what is due process of law, because this court certainly is better informed on what constitutes due process of law than we or anything that we could say concerning it.

The theory of the Supreme Court of North Dakota with reference to the cancellation of this contract is wrong in principle.

Story, Conflict of Law, sec. 349, says:

> "The general proposition laid down by the jurists is that the extinction or bar of an obligation in the place of performance is its extinction or bar everywhere."

There is no question but what that is the rule. It is logical and is what one would naturally expect. Suppose in this Kryger contract the Daniel-Jones Company had agreed to sell the land in North Dakota, also a tract of land in Canada, also a tract of land in Texas—they would have the right to sell the land in these three States under one contract.

Now, we will suppose that the law with reference to the cancellation of contracts in North Dakota, Canada, and Texas are all different from each other. In order to cancel this contract, would it be necessary to first cancel it in North Dakota, then cancel it in Canada, and then cancel it in Texas with reference to each particular piece of land in the

POOR

contract? It seems ridiculous. The only proper place to cancel that contract is in Minnesota, where it was made and where it was to be performed, and that would end the contract for all time.

The Supreme Court of North Dakota seems to have confused the cancellation proceeding by Daniel-Jones Company against Kryger with the quiet-title suit brought by Edward H. Wilson against Kryger.

If we understand a quiet-title suit it is a suit to determine the title to the property and the interests of the respective parties to the land. Further than that it does not go; in other words, the court will decree the title to the land just as it finds it. If the court finds that there was a mortgage on the land it will simply decree that one of the defendants has a mortgage on the land. It will not foreclose the mortgage or determine anything further than to simply find that there was a mortgage on the land. Supposing there is a mechanic's lien against the land—the court will not foreclose the mechanic's lien, but will simply find that there is a lien upon the land. Just so with a contract for purchase. If the court finds that there is a contract for purchase of the land held by the defendant, the court will simply find that there is an outstanding contract for the purchase of that land. It will not foreclose the contract or will not order specific performance of the contract. In other words, the court will decree the title just as it is—nothing more, nothing less.

The decision as it stands not only gives the title to the land to Edward H. Wilson, but does more. It determines the liability of the Daniel-Jones Company on this Kryger contract and forecloses forever any action that Kryger may have against the Daniel-Jones Company on account of that contract.

Another thing the Supreme Court of North Dakota overlooked in this contract, and that is this contract is an executory contract. It does not have the force and effect of a deed or mortgage or other instrument of such a character. It is

COPY

simply an agreement to do certain things with land in North Dakota. It does not convey the land. It does not pass title to the land. It does not do anything with the land except the owner is contracting or agreeing at some future time upon certain conditions to convey the land, and all reference to the law of mortgages or the law of deeds is not in point with this contract here. We are dealing with obligations to do certain things and in the other cases we are dealing with executed contracts. There is a vast difference between the rights of the parties with reference to the two.

IV.

If the decision of the Supreme Court of North Dakota is allowed to stand it amounts to an impairment of the obligations of the contract, contrary to Article I, Section X, of the Constitution of the United States.

A law does not impair the obligation of a contract within the meaning of the Constitution if neither party is relieved thereby from performing anything of that which he obligated himself to do, but if either party is absolved from performing any of these things such obligation is impaired, whether the absolution is effected directly and expressly or indirectly and only as a result of some modification of the legal proceedings for enforcement. State of Minnesota *ex rel. vs.* Kramer, 115 Minn., 422; 117 N. W., 780.

A law (or a decision of a court) which purports to act only upon the remedy, but which amounts to a denial or restriction of rights accruing under a contract, is obnoxious to the Constitution. Von Hoffman *vs.* Quincy, 4 Wall., 553; 18 L. Ed., 409; Cooley, Const. Lim., 178.

The decision of the Supreme Court of North Dakota, while it held that the cancellation proceeding was simply a remedy, yet the effect of it was the denial of the rights accruing under the contract between Daniel-Jones Company

and Kryger, and as it now stands impairs the obligations of the contract in question. Its effect is the annulment of all obligations thereunder. It virtually determines that now there are no obligations to be performed under that contract. When the parties embodied the Minnesota law in their contract that law becomes a part of the obligations of the contract, and the decision of a court of another State cannot constitutionally hold that the law of another State governs the termination of its obligation, because such decision impairs the obligation of that contract by nullifying and ignoring the law that was made a part of the obligation of the contract at its inception.

The decision of the Supreme Court of North Dakota and the lower court should not be allowed to stand and should be vacated for the reasons stated.

Respectfully submitted,

O. E. HOLMAN.
WILLIAM W. FRY.

(30318)

COPY

POOR

FILED
NOV 13 1916
JAMES D. MAHER
CLE

(24,653)

Supreme Court of the United States.

OCTOBER TERM, 1915.

99
No. 421.

HENRY H. KEYGER,
Plaintiff in Error,

vs.

IDA S. WILSON AND J. E. DAVIS, AS ADMINISTRATORS OF EDWARD H. WILSON, DECEASED,
Defendants in Error.

Brief for Defendants in Error.

GEORGE S. GRIMES,
JESSE VAN VALKENBURG,
Minneapolis, Minn.,
Attorneys for Defendants in Error.

Review Publishing Company, 225 So. 3rd St., Minneapolis

COPY

(24,833)

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 421.

HENRY H. KRYGER,

Plaintiff in Error,

vs.

IDA S. WILSON AND J. E. DAVIS, AS ADMINISTRATORS OF EDWARD H. WILSON, DECEASED,

Defendants in Error.

Brief for Defendants in Error.

DEFENDANTS' STATEMENT OF CASE.

This action is one in equity to determine adverse claims to lands in Kidder county, North Dakota. The complaint is in form prescribed by the statute of North Dakota then in force (Par. 7322 Revised Codes for North Dakota, 1905. P. R., p. 10).

The answer alleges that the plaintiff in error, Henry H. Kryger, is owner of the land in question by contract for deed executed by Daniels-Jones

Company, a corporation, to one Carl Peterson, and assigned to said Kryger (P. B., p. 14), and asks affirmative relief.

The reply admits the making of the contract in question, alleges that no sums whatever have been paid thereon; specifically denies the alleged assignment thereof to Kryger, and alleges that said contract has been legally terminated for failure of the purchaser to perform, said termination having been made in conformity with Article 3, of Chapter 38, of Revised Codes of North Dakota for 1905, then in force.

By his answer the plaintiff in error anticipates this defense, and alleges the law of Minnesota then in force for the cancellation of similar contracts, claims that the contract in question was a Minnesota contract, and that it should have been terminated according to Minnesota laws rather than North Dakota laws.

Said Kryger signed his own papers, and no attorney authorized to practice law in North Dakota appeared in the action on behalf of said Kryger until the action reached the Supreme Court of North Dakota.

Said Kryger failed to appear at the trial of the case in the District Court of Kidder county either in person or by attorney, and no testimony was offered in his behalf.

The plaintiff proved up his case; findings were made by the court for plaintiff, and judgment was entered thereupon, from which judgment the plain-

POOR C

tiff in error appealed to the Supreme Court of North Dakota, which affirmed the judgment (149 N. W. R. 721).

Previously upon motion to dismiss the appeal, the Supreme Court of North Dakota limited the issues to errors appearing upon the judgment roll (143 N. W. R. 764).

No settled case, bill of exceptions, nor agreed statement of facts was ever prepared, and no finding was made that the contract in question was ever assigned to plaintiff in error, and no finding was made that the Minnesota law applying to termination of contracts was different from that of North Dakota (P. B., pp. 24-a to 24-h).

The action was brought under Chapter 31 of the Revised Codes of North Dakota for 1905, of which the material portions are as follows:

> "Par. 7519. Action to determine adverse claims. An action may be maintained by any persons having an estate or interest in or lien or incumbrance upon real property whether in or out of possession thereof, and whether said property is vacant or unoccupied, against any person claiming an estate or interest in or lien or incumbrance upon the same for the purpose of determining such adverse estate, interest, lien or incumbrance."
>
> "Par. 7524. Unknown persons made parties. All persons having or claiming an estate or interest in, or lien or incumbrance upon the property described in the complaint, whether as heirs, devisees, legatees, or personal representatives of a deceased person, or under any other title or interest, and not in possession or not appearing of record in the office of the register of deeds, the clerk of the District Court or the county auditor of the county in which the

land is situate to have such claim, title or interest therein, may be proceeded against as persons unknown, and any order, judgment or decree entered in the action shall be valid and binding on such unknown persons, whether of age or minors, and on those claiming under them."

The cancellation proceeding of which Kryger complains was made in conformity with Article 3 of Chapter 30 of Revised Codes of North Dakota for 1905, of which the material portions are as follows:

"Par. 7494. Owner must give written notice to vendee or purchaser. No owner of real estate, or owner of any equity therein, (who) shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future conveyance of any such real estate or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, or his assigns, as hereinafter provided; and such notice shall be given to such vendee or purchaser or his assigns, notwithstanding any provision or condition in any such instrument to the contrary."

"Par. 7495. In case of default. Contents of notice. Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same, (he) shall, within a reasonable time after such default, cause a written notice to be served upon the vendee or purchaser, or his assigns, stating that such default occurred, and that said contract will be cancelled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty days after the service of such notice."

POOR C

"Par. 7496. Notice how served. Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in the District Court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state or cannot be found therein, of which fact, the return of the sheriff of the county in which said real estate is situated, that such person to be served cannot be found in his county, shall be *prima facie* evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within said county, then in a newspaper published at the capital of this state for a period of three successive weeks."

"Par. 7497. Time allowed. Such vendee or purchaser, or his assigns, shall have thirty days after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred; and upon such performance, and upon making such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default had occurred therein. No provision in any contract for the purchase of land, or an interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding."

BRIEF OF ARGUMENT.

No federal question is raised by this action.

The sole question open to plaintiff on this appeal is whether the court's conclusions of law are legally sustained by the findings of fact.

Allen v. St. Louis Bank, 120 U. S. 20-30.

Callaesen v. United States, 142 U. S. 140—bottom p. 147.

C. M. & c Ry. v. Hoyt, 149 U. S. 1-11.

Benites v. Hampton, 123 U. S. 519.

ARGUMENT.

The action involves title to four sections of land numbered seven, nine, fifteen and seventeen, in township 143, range seventy-two, Kidder county, North Dakota (finding II).

The original plaintiff, now deceased, had title in fee simple to the land by deeds from Daniels-Jones Company, dated May 11, 1911, and May 15, 1911, unless contract for deed to Carl Peterson, dated January 19, 1909, was then in force and owned by defendant Kryger (ff. III-IV).

That contract provided for an earnest money payment of one dollar and monthly payments thereafter, none of which payments was ever made or tendered, and no interest was ever paid on the contract (f. IV).

The plaintiff in error on March 1, 1909, in lieu of recording the contract in question, which would require the payment of any taxes then unpaid on

the land, filed in the office of the Register of Deeds of Kidder county, North Dakota, an affidavit which is nowhere provided for under the laws of North Dakota, stating that he held a contract for deed on the land in question (f. V), and on January 3, 1911, filed for record in said office a pretended contract between himself and William Piper for one-half interest in said land (f. VII).

On April 17, 1909, Daniels-Jones Company, then owner of the land, caused notice of cancellation of said contract to be prepared and addressed to Carl Peterson, and the defendant Henry H. Kryger, which specified the existing default on the part of the vendee in said contract, including two instalments and unpaid interest, and required the vendee within thirty days after service of such notice upon them to pay to said Daniels-Jones Company, the amount of such default, and notified said Peterson and Kryger that unless so paid within said time said contract would be cancelled and terminated, and all the right, title and interest of said defendants Peterson and Kryger in said contract and in the lands affected thereby, forfeited and annulled at the expiration of said thirty days. Such notice was placed in the hands of the sheriff of Kidder county for service, who made return of not found, after which the notice was published as required by the North Dakota laws then in force. No payments were made within the time specified, nor at all (f. VI).

The court's conclusion of law is that Edward H. Wilson, original defendant in error, is owner of

R COPY

the land in question and entitled to the possession thereof, and that said Kryger has no interest therein, and that the title to the same should be forever quieted in said defendant in error. Judgment was entered accordingly.

Based upon the findings of fact, it is believed no other conclusion could possibly be reached.

Plaintiff in error does not raise the question that the North Dakota cancellation statute is not constitutional, but if he did, such contention would appear to have been decided adversely by the Supreme Court of the United States in *Selover, Bates & Co. v. Walsh*, 226 U. S. 112, in which the court says, referring to a similar statute then in force in Minnesota, "It is elementary that the obligation of a contract is the law under which it was made, and we are not disposed to expend much time to show that the Minnesota statute was a valid exercise of the police power of the state." See also *House v. Mayes*, 219 U. S. 270 (31 L. Ed. 234).

Plaintiff in error complains because no personal notice in Minnesota was served upon Kryger of the attempted cancellation of the contract for deed, but the law of North Dakota provided that where the notice could not be served in the state of North Dakota, it should be published in a newspaper printed in the county where the land lay, and that was done.

He argues that the cancellation should have been made under the law of the state of Minnesota, but fails to prove what that law was. He fails also to show that he had any interest in the contract in

question. He was included in the notice to terminate the contract because of the affidavit filed in which he claimed to be owner of the land, but such affidavit of course is no evidence of such ownership, nor does it amount to an admission of ownership that Kryger was included in the notice.

There is no evidence nor finding that the contract in question is a Minnesota contract, nor where Kryger lived, nor where the Daniels-Jones Company had its place of business.

The decision of the Supreme Court of North Dakota, P. B., p. 26 and following, 149 N. W. R. 721, is referred to as showing the points considered by that court, and the arguments and citations there found are hereby adopted as a part of this statement, especially those pertaining to the place where the termination should be brought. But it is urged that under the findings, the defendant Kryger was not entitled to have such question considered, in the absence of any finding that he was interested in the contract in question, or in the land affected thereby.

It is believed that the judgment of the courts of North Dakota, should be affirmed.

Respectfully submitted,

GEORGE S. GRIMES,

JESSE VAN VALKENBURG,

Minneapolis, Minn.,

Attorneys for Defendants in Error.

R COPY

KRYGER *v.* WILSON ET AL., ADMINISTRATORS.[1]

ERROR TO THE SUPREME COURT OF THE STATE OF NORTH DAKOTA.

No. 99. Submitted November 13, 1916.—Decided December 4, 1916.

Whether the cancellation of a land contract is governed by the law of the *situs* or the law of the place of making and performance is a question of local common law with which this court is not concerned in a case coming from a state tribunal.

In a suit in a state court to quiet title to land within its jurisdiction, a resident of another State voluntarily appeared and, as defendant and counterclaimant, asserted his right to possession and control of the land under a contract of sale. The court adjudged that his rights under the contract were gone as the result of statutory pro-

---

[1] The title of this case, as originally docketed, was "*Henry H. Kryger, plaintiff in error*, v. *Edward H. Wilson.*" On October 9, 1916, the death of Edward H. Wilson was suggested and the appearance of Ida S. Wilson and J. E. Davis, administrators, as the parties defendant in error, was filed and entered.

ceedings for forfeiture and cancellation taken pursuant to the *lex loci rei sitæ*. *Held*, that, whether the court was right or wrong in upholding the cancellation proceeding as applied to the contract, there was no denial of due process of law, since due process was afforded in the suit to quiet title itself. *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112, distinguished.

Such proceedings as are required by Minnesota Revised Statutes, 1905, § 4442, and North Dakota Revised Code of Civil Procedure, 1905, ch. 30, Art. 3, pars. 7494–7497, in order to enable a vendor to cancel and avoid a contract for a default of the vendee, are not judicial proceedings but merely statutory conditions upon the right of cancellation, and hence the absence of notice does not involve a denial of due process.

No federal question arises under the contract clause from the impairment of a contractual obligation by judicial decision alone.

29 N. Dak. 28, affirmed.

THE case is stated in the opinion.

Mr. O. E. Holman and *Mr. William W. Fry* for plaintiff in error:

A contract for the sale of real estate must be canceled according to the law of and in the State where it was made, where all the parties to it reside, and where it is to be performed. *Finnes* v. *Selover*, 102 Minnesota, 334; *Walsh* v. *Selover, Bates & Co.*, 109 Minnesota, 136; and the latter case in this court, *Selover, Bates & Co.* v. *Walsh*, 226 U. S. 112. The contract in the *Walsh Case* was by no means as clearly a Minnesota contract as is the contract in the case at bar.

The contract involves rights irrespective of the location of the land. It does not itself convey the land, being simply an agreement that upon payment a conveyance will be made. The form of conveyance would have to suit the *lex sitæ*, but the Minnesota courts, if they had jurisdiction of the vendor, could compel a conveyance in that form. See *Polson* v. *Stewart*, 167 Massachusetts, 211.

The process by which the obligation of a contract is

canceled is not remedial merely; it goes to the substance. *Scudder* v. *Union National Bank*, 91 U. S. 406; *True* v. *Northern Pacific Railway*, 126 Minnesota, 72. This, being a Minnesota contract, could be canceled only by complying with the Minnesota law. The attempt in North Dakota was void. Kryger's vested right could not be disturbed without due process. The constitutional inhibition applies to every form of proceeding, legislative, judicial and executive. Kryger had no notice of the cancellation proceeding, or anything approaching notice. If the contract is canceled at all it must be canceled as a whole, and this can only be done as provided by the Minnesota law.

In the suit to quiet title the court should have decreed the title as it found it and stopped; it should not have proceeded to determine the liability of Kryger's vendor.

The decision is an impairment of the obligation of the contract. *Minnesota ex rel. National Bond & Security Co.* v. *Krahmer*, 105 Minnesota, 422; *Von Hoffman* v. *Quincy*, 4 Wall. 553; Cooley, Const. Lim., 178. It in effect determines that no obligation under it any longer exists. The Minnesota law being part of the contract, fixing its obligations, the Dakota judgment impairs the contract indirectly by reading that law entirely out of it.

Mr. George S. Grimes and *Mr. Jesse Van Valkenburg* for defendants in error.

Mr. Justice Brandeis delivered the opinion of the court.

This case comes here on writ of error to the Supreme Court of North Dakota to review a decree quieting title in the defendant in error—the plaintiff below—to land situated in that State. The plaintiff in error, a resident of Minnesota, claimed under an executory contract for

the purchase of the land in controversy, and the rights of the parties turned upon whether this contract was outstanding or had been duly cancelled. Both Minnesota, where the contract was made and to be performed, and North Dakota, had statutes providing that a vendor in a contract for the sale of land may not cancel and terminate the same upon default, except after written notice to the vendee giving him at least thirty days within which to make good his non-performance. Minn. R. S., 1905, § 4442; N. Dak. Rev. Code, 1905, Chap. 30, Art. 3. The material provisions of the latter statute are copied in the margin.[1] The vendor in this case (grantor of defendant

[1] N. Dak. Rev. Code of Civ. Pro. (1905), Chap. 30, Art. 3:

"Par. 7484. Owner must give written notice to vendee or purchaser. No owner of real estate, or owner of any equity therein, [who] shall hereafter make or execute a contract for deed, bond for deed, or other instrument for the future conveyance of any such real estate or equity therein, shall have the right to declare a cancellation, termination or forfeiture thereof or thereunder, except upon written notice to the vendee or purchaser, or his assigns, as hereinafter provided; and such notice shall be given to such vendee or purchaser or his assigns, notwithstanding any provision or condition in any such instrument to the contrary.

"Par. 7485. In case of default. Contents of notice. Whenever any default shall have been made in the terms or conditions of any such instrument hereinafter made, and the owner or vendor shall desire to cancel or terminate the same, [he] shall, within a reasonable time after such default, cause a written notice to be served upon the vendee or purchaser, or his assigns, stating that such default occurred, and that said contract will be cancelled or terminated, and shall recite in said notice the time when said cancellation or termination shall take effect, which shall not be less than thirty days after the service of such notice.

"Par. 7486. Notice how served. Such notice shall be served upon the vendee or purchaser, or his assigns, in the manner now provided for the service of summons in the District Court of this state, if such person to be served resides within the state. If such vendee or purchaser, or his assigns, as the case may be, resides without the state or cannot be found therein, of which fact, the return of the sheriff of the county in which said real estate is situated, that such person to be served cannot

in error) had given to the sheriff of the county where the land lay a written notice of cancellation to be served upon the plaintiff in error if found within the said county, and upon return of *not found*, caused the same to be published in a county newspaper, and later filed for record affidavits of publication and of non-redemption—all in conformity with the North Dakota statute, if it applied.

When the present action was brought to quiet title, plaintiff in error defended, and asked for counter relief, contending that his contract was still valid and subsisting, as the action prescribed by the Minnesota statute to entitle a vendee to cancel had not been taken. The trial court held that the North Dakota law governed; that under it the contract had been "duly and legally cancelled"; that the plaintiff in error having shown no right in the land, title should be forever quieted in the defendant in error. This decree was affirmed by the Supreme Court on appeal. *Wilson* v. *Kruger*, 29 N. Dak. 29. We are asked to review the case on the ground that the state court deprived the plaintiff in error of property without

---

be found in his county, shall be *prima facie* evidence, then such notice shall be served by the publication thereof in a weekly newspaper within said county; or, if there is no weekly newspaper within said county, then in a newspaper published at the capital of this state for a period of three successive weeks.

"Par. 7407. Time allowed. Such vendee or purchaser, or his assigns, shall have thirty days after the service of such notice upon him in which to perform the conditions or comply with the provisions upon which the default shall have occurred, and upon such performance, and upon making such payment, together with the costs of service of such notice, such contract or other instrument shall be reinstated and shall remain in force and effect the same as if no default had occurred therein. No provision in any contract for the purchase of land, or an interest in land, shall be construed to obviate the necessity of giving the aforesaid notice, and no contract shall terminate until such notice is given, any provision in such contract to the contrary notwithstanding."

The provisions of the Minnesota statute are substantially to the same effect.

due process of law and impaired the obligation of his contract, in holding that the cancellation proceeding, of which the plaintiff in error had no actual notice, effectively terminated his rights under the contract.

It is apparent from the above statement that there has been no lack of due process. The court below, having jurisdiction of the suit to quiet title, was called upon to determine the conflicting claims to the land. The plaintiff in error voluntarily appeared and he availed himself of the opportunity to urge his claims to equitable ownership under the contract of sale. The court decided against him, holding the contract no longer outstanding. The most that the plaintiff in error can say is that the state court made a mistaken application of doctrines of the conflict of laws in deciding that the cancellation of a land contract is governed by the law of the situs instead of the place of making and performance. But that, being purely a question of local common law, is a matter with which this court is not concerned. *Pennsylvania R. Co.* v. *Hughes*, 191 U. S. 477; *Finney* v. *Guy*, 189 U. S. 335, 346; *Allen* v. *Alleghany Co.*, 196 U. S. 458; *Morrow* v. *Brinkley*, 129 U. S. 172.

The argument of the plaintiff in error is seemingly based upon the erroneous theory that his rights were foreclosed by the cancellation proceeding, which, lacking the requisite notice, deprived him of property without due process. But the action under the cancellation statute was in no sense a judicial proceeding. It was simply a statutory condition with which vendees were required to comply before they could take advantage of a default by the vendee. If the contract properly interpreted or the law properly applied required that this condition be performed in Minnesota, steps taken by him under the North Dakota statute would be ineffective. Whether or not proper proceedings had been taken to secure cancellation could be determined only by a court having

jurisdiction; and the North Dakota court had jurisdiction not only over the land but through the voluntary appearance of plaintiff in error, also over him. His rights have been foreclosed, not by the cancellation proceeding under the statute, but by a due and regular judicial decree which was based upon the finding that a default had occurred, of which the vendor was entitled to take advantage, having complied with the proper law. If the plaintiff in error had not submitted himself to the jurisdiction of the court, the decree could have determined only the title to the land and would have left him free to assert any personal rights he may have had under the contract. But having come into court and specifically asked in his cross bill that he be declared entitled to the "possession and control of the real estate described in the complaint herein under a contract of sale," he cannot now complain if he has been concluded altogether in the premises. The plaintiff in error relies upon *Scherer, Bates & Co.* v. *Walsh*, 226 U. S. 112. That was a personal action for breach of contract and not, like the present case, an action merely to determine the title to land; and as the court found on the facts there involved that the proper law as to cancellation had been applied, the case cannot be construed as holding that an erroneous application thereof would raise a question of due process.

The contention based on the contract clause is equally devoid of merit, for there has been no subsequent legislation impairing the obligation of the contract. Impairment by judicial decision does not raise a federal question. *Cross Lake Shooting and Fishing Club* v. *Louisiana*, 224 U. S. 632.

Judgment affirmed.